SUPREME COURT. U. S.
No. 347

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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES DICKSON FAIR, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, et al. .... Petitioners

vs.

JAMES HOWARD MEREDITH, on behalf of himself and all others similarly situated .... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Charles Dickson Fair, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Euclid Ray Jobe, Executive Secretary of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Edgar Ray Izard, Leon Lowrey, Ira Lamar Morgan, Malcolm Mette Roberts, William Orlando Stone, S. R. Evans, Verner Smith Holmes, James Napoleon Lipscomb, Tally D. Riddell, Harry Gordon Carpenter, Robert Bruce Smith, II, and Thomas Jefferson Tubb, Members of the Board of Trustees of State Institutions of Higher Learning, James Davis Williams, Chancellor of the University of Mississippi, Arthur Beverly Lewis, Dean of the College of Liberal Arts of the University of Mississippi, and Robert Byron Ellis, Registrar of the University of

Mississippi, hereinafter referred to as PETITIONERS, pray that a Writ of Certiorari issue to review (1) the injunction order of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 12th day of June, 1962 (A. ~~41~~); (2) the judgment of said court in the above case dated June 25, 1962, issued as and for the mandate of said court on the 17th day of July, 1962 (A. 89); (3) the judgment of said court in the above case dated July 27, 1962, issued July 27, 1962 as and for the mandate of said court, as amended on July 28, 1962 (A. 105); (4) the order of said court vacating stay, recalling mandate and issuing new mandate forthwith, which is undated but which was certified by the clerk of said court on the 27th day of July, 1962 (A. 95); the order of said court dated the 28th day of July, 1962 (A. 111) (Copies of said orders being appended to this opinion at the appendix pages indicated); and the action of said court in forbidding the clerk of said court to furnish certified copies of documents and records in his office connected with this case.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Mississippi, Jackson Division, on motion for preliminary injunction (R. 210) (A. 1), is reported at 199 F. Supp. 754; the opinion of the Court of Appeals for the Fifth Circuit on the appeal of the denial of motion for preliminary injunction (R. 228) (A. 11) is reported at 298 F. 2d 696; the opinion of the District Court for the Southern District of Mississippi, Jackson Division, after trial on the merits (R. 722) (A. 25) is reported at 202 F. Supp. 214; the opinion of said Court of Appeals on motion for injunction pending appeal (R. 734) (A. 35) is not yet reported; the opinion of said Court of

Appeals on the appeal from the trial on the merits (R. 869) (A. 45) is not yet reported; the instrument of said Court of Appeals, styled, "ORDER VACATING STAY, RECALLING MANDATE AND ISSUING NEW MANDATE FORTHWITH" (A. 95) is not yet reported. (Copies of all said opinions are appended to this petition at the appendix pages indicated.)

JURISDICTION

Jurisdiction to review these orders and action of said Court of Appeals by Writ of Certiorari is conferred upon this Honorable Supreme Court under Title 28, *U. S. Code*, Sections 1254(1) and 2101(c) and (f).

QUESTIONS PRESENTED

The questions presented by this petition are:

1.

Does a United States Court of Appeals have original jurisdiction to hear and determine causes under Title 28, *U. S. Code*, Section 1291?

2.

Did the Honorable Court of Appeals for the Fifth Circuit err in ordering the entry of class action relief on the basis of a record devoid of any proof of the propriety of such relief?

3.

Did the said Honorable Court of Appeals err in mandatorily ordering Appellant-Respondent James H. Meredith, (hereinafter referred to as RESPONDENT) admitted to the University of Mississippi at mid-session or at Respondent's option, contrary to the rules and regulations of said institution, thereby denying all discretion to the Registrar and other officials of such University to consider facts affecting Respondent's admission not disclosed in the record of this cause and not existent at the time the record was made in the trial court?

3a.

Is the manditory injunction of the Honorable Court of Appeals for the Fifth Circuit in conflict with the decision of this court in the cases of: *Waugh v. The Board of Trustees of the University of Mississippi*, 237 U. S. 589, 59 L. Ed. 1131, 35 S. Ct. 720; and *Hamilton v. Board of Regents of the University of Calif.*, 293 U. S. 245, 79 L. Ed. 343, 55 S. Ct. 197?

4.

Did the action of the Honorable Court of Appeals for the Fifth Circuit in determining (without composing a three-judge court under Title 28, *U. S. Code*, Section 2281) that a regulation of the Board of Trustees of Institutions of Higher Learning of the State of Mississippi requiring applicants to colleges under its supervision to submit recommendations from alumni as to their good moral character and ability to pursue college level work, result in the decision of an important state question in a way to conflict with the applicable Constitution and Laws of the State of Mississippi?

5.

Did the actions of the Honorable Court of Appeals for the Fifth Circuit, subsequent to the issuance of its mandate, in: (a) directing the clerk of said court not to perform ordinary ministerial functions of his office;

(b) acting upon its own motion to initiate new proceedings in the court to reassume jurisdiction; (c) recalling its mandate; (d) vacating a statutory stay granted under Title 28, *U. S. Code,* Section 2101(f) on the grounds that no action thereunder could be taken by a judge who was not a member of the panel who heard the case; (e) rendering a new judgment or decision purporting to circumvent the stay so granted; (f) forthwith and immediately issuing its mandate on July 27, 1962, contrary to the provisions of its own Rule 32 which provides that the mandate shall not issue until 21 days after the date of its decision in any cause; and (g) making an order, after it has issued its mandate reversing and remanding the cause to the District Court, enjoining a criminal proceeding under the valid laws of a sovereign state without notice of the parties enjoined or any hearing or opportunity for hearing, which injunction is directed to a person not even a party to the present action; constitute such a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDERS INVOLVED

The statutes involved in the consideration of this petition are: Title 28, *U. S. Code,* Federal Rules of Civil Procedure, Rules 52(a) and 65(a-d) (A. 117); Sections 1254(1), 1291, 2101(c) & (f), 2201 and 2281 (A. 119); Title 42, *U. S. Code,* Section 1983 (A. 121); Mississippi Constitution (1890) § 213A (A. 121); and the orders and regulations of the Board of Trustees of Institutions of Higher Learning of the State of Mississippi and the University of Mississippi (A. 124).

(The pertinent portions of the aforesaid are set forth in the appendix to this petition at the appendix pages indicated.)

STATEMENT OF THE CASE

A.

Jurisdiction

Jurisdiction in the court of first instance was invoked under Title 28, *U. S. Code,* Sections 1343 (3) and 2201, and Title 42, *U. S. Code,* Section 1983.

B.

Pleadings and Proceedings

The Respondent filed a Complaint in the U. S. District Court for the Southern District of Mississippi on the 31st day of May, 1961, seeking a prohibitory injunction. He also prayed for a declaratory judgment (R. 16). A motion for a temporary restraining order without notice was denied (R. 19) and the matter came on for hearing on motion for preliminary injunction (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 1). Respondent appealed from a denial of this motion and the Court of Appeals affirmed and remanded the case for trial on the merits.

After trial on the merits, the District Court denied the relief sought by Respondent and he again appealed to the Court of Appeals for the Fifth Circuit. The Court of Appeals denied a motion of Respondent for injunction pending appeal. The appellate court reversed the case and remanded the same to the District Court with instructions to grant the relief prayed for in the Complaint

(R. 869.) Prior to any action thereon by the District Judge, a Judge of the Court of Appeals for the Fifth Circuit stayed the execution and enforcement of that court's mandate for a reasonable time to enable Petitioners to file a petition for a Writ of Certiorari with this Supreme Court, under the provisions of Title 28, *U. S. Code*, Section 2101(f), (R. 925) (A. 93).

After directing its clerk to withhold any certification of the record of proceedings in this cause requested by Petitioners (A. 134), the Court of Appeals then *initiated a new proceeding* in that court, rendered an opinion that the statutory stay was improper and directed the parties to file statements and briefs with it with regard to actions that the Court of Appeals evidently contemplated taking in the cause then pending before the District Court (R. 925(a) (A. 133). In response to this direction, Respondent filed certain motions with the said Court of Appeals requesting the contemplated actions (R. 926). The Court of Appeals then issued a series of orders recalling its mandate, setting aside the stay granted pursuant to Section 2101(f), issuing its mandate forthwith to the lower court directing the issuance of an injunction there and issuing a mandatory injunction directing the immediate admission of Respondent during the middle of the second summer session of the 1962 academic year of the University of Mississippi, or the admission of said Respondent "in September," according to Respondent's personal wish (R. 962). The same judge who stayed the execution and enforcement of the previous mandate and judgment stayed the execution and enforcement of the subsequent orders, judgment and new mandate under the same statute [28 *U. S. Code*, § 2101(f)], (R. 983) (A. 115).

C.

Statement of Facts

Respondent graduated from High School in the State of Florida in the year 1951 (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 57); he was then 17 years of age (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 58). He served in the U. S. Air Force by his own voluntary choice for a period of 9 years, until his discharge therefrom on the 21st day of July, 1960 (Deposition of James H. Meredith, Defendant's Exhibit 28, Page 28). He then entered Jackson State College in Jackson, Mississippi, in the month of September, 1960 (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 75). On the 31st day of January, 1961, he made application to transfer to the 2nd or final semester of the 1960-61 academic year of the University of Mississippi (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Page 16). Upon being advised his application could not be considered for that semester, he requested that it be considered for the summer session of the 1961-62 academic year, which began in June of 1961 (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Page 22). This application was denied on May 25, 1961 (T.R. on Prel. Inj., Plantiff's Exhibit 16, Vol. 1, Page 55). Suit was filed six days later (R. 17).

Respondent is a senior at Jackson State College. He has dropped courses in a conscious effort not to graduate (R. 930). If he transfers to the University of Mississippi he will loose all credit for his Air Force G.E.D. tests which Jackson College has accepted and will, under the regulations of the University, have to spend a minimum of one academic year as a student at the University to receive a diploma (R. 486) (A. 128). The Registrar of the

University is thoroughly familiar with the provisions of Public Law 550 which is the source of all support Respondent has for his family and himself and which must make up the deficit operations on his farms. The Registrar believes that the set back in educational progress which Respondent's requested transfer will bring will result in the loss of benefits to Respondent under this law (R. 481).

During the course of the proceedings in the trial court, Respondent was questioned about his acquisition of government paper, on which certain parts of his application were made. Under oath he gave three conflicting versions of where this paper had been obtained—(1) it was his personal paper and he bought it (Deposition of James H. Meredith, Defendants' Exhibit 28, Page 78), (2) it belonged to the government and he had taken it because he knew of no serious objections to "clerks taking a few sheets of paper to type a letter or something," (Deposition of James H. Meredith, Defendants' Exhibit 28, Page 79), (3) it had been discarded by the government and he had picked it up in the trash (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 129, 130, 131). It was also developed that Respondent had consulted an Air Force Psychiatrist because of the nervous condition described as compulsive obsessive neurosis (evidenced by a need to fight and defy authority). He omitted any reference to this neurosis in the physical information given to the University, although he stated to the Air Force that he had such a nervous and mental condition *after* the date of his psychiatric consultation in connection with his separation therefrom (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Pages 200-201). Again under oath, he testified that he had intentionally omitted reference to the disorder from the University's application information for the reason that he had been advised by the psychiatrist that he did not have such a condition though his Air Force records clearly showed such disorder (T:R, on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 201).

Two days subsequent to his application to the University, in which he identified himself as a *resident of Attala County, Mississippi,* he completed written oaths before the Registrar of Voters in Hinds County, Mississippi that he was a *resident of Hinds County* (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 2, Page 3[illegible]). His sworn testimony throughout this record was that he was a resident of Attala County, Mississippi; only his oaths before the Registrar of Voters are to the contrary. Evidence was also presented to the District Court that Respondent had been a member of a student organization at Jackson State College which had published hand bills agitating for defiance by students against the faculty of that school (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Pages 146-147; Vol. 2, Pages 327, 330). He denied that he agreed with the content of this particular hand bill. He first testified that he had not assisted in preparing other writings of the same organization, but changed his testimony on cross-examination (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 1, Page 194).

In the course of preparing for the trial on the merits, Petitioners' counsel interviewed the five Attala County citizens who Respondent purportedly had voluntarily contacted to write letters certifying his good moral character and recommending his ability to do college level work at the University (R. 662, 663). Four out of these five citizens signed affidavits which were made a part of the University Registrar's files, which stated that they had not personally known the applicant for the required length of time and were not in a position to make any certifications as to his moral character or any recommendations for his admission to any college (R. 663, 665, 666, 668). Three of these citizens also stated under oath that the letters as signed by them contained no reference to the University. Two of them were led to believe the letters were to help Respondent get a job (R. 664, 666).

The Registrar testified that he had denied Respondent's application without regard to his race or color because it did not meet the applicable regulations of the Board of Trustees of Institutions of Higher Learning and the University, inasmuch as it did not contain any certificates or recommendations meeting the requirements for resident or non-resident students [which latter certificates and recommendations are not required to be from alumni but are only required to be from responsible citizens of the applicant's community who have known him for at least two years (A. 124)], and because Respondent sought to transfer from an institution which was not, at the time of the making of the application or at the time of the ruling on the application, an approved institution within the requirements of the University's bulletin regulations (A. 127), and because the application indicated to the Registrar that a transfer would result in the applicant's loss of his GI educational benefits under Public Law 550, on account of the large number of credits which were acceptable as work at Jackson State College toward a degree which would not be acceptable and would be lost to the applicant on a transfer to the University (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 2, Pages 363-367, 371-372, 453-455). The Registrar testified that at Respondent's age this necessary set back in his educational progress evidenced an unreal attitude toward pursuit of a college degree (T.R. on Prel. Inj., Plaintiff's Exhibit 16, Vol. 2, Page 373). The Registrar testified that since the rejection of the application on May 25, 1961, he had reviewed the testimony of the Respondent and the evidence produced on the trial of the cause, and that he was of the opinion that the applicant was not applying to the University to further his education but was instead trying to make trouble to satisfy his neurosis. The Registrar further stated that even if this application were considered to be a continuing application, contrary to the long established rules of the University, the application would have to be again denied (R. 670). This testimony was given on the 26th day of January, 1962 and the proof in the trial court was concluded on that date (R. 721).

At the conclusion of the trial on the merits in the lower court, the District Judge refused to consider or rule on any facts, conflicting or unconflicting, which came to the knowledge of the Registrar of the University of Mississippi subsequent to his May 25, 1961 denial of Respondent's application, and held that the application was denied on May 25, 1961 on non-discriminatory grounds. The Complaint was, therefore, dismissed. *On appeal, the Court of Appeals reversed this finding and proceeded to make original determinations of fact matters which the lower court had not reviewed and on which said trial court had expressly declined to make findings.*

ARGUMENT

I.

A United States Court of Appeals does not have original jurisdiction to hear and determine causes under Title 28, *U. S. Code, Section* 1291

At the outset, we respectfully direct the court's attention to the opinion of the Court of Appeals reversing and remanding the cause after the trial on the merits, and to the following comparison of the adjectives, adverbs and phrases used in the majority opinion to describe the litigants and their actions.

As to the Petitioners, the opinion was couched in these words and phrases:

> "a carefully calculated campaign of delay, harassment, and masterly inactivity"
>
> "evasive tactics which would have been a credit to Quintus Fabius Maximum"
>
> "Fabian Policy of planned discouragement and discrimination by delay"
>
> "elequent silence"
>
> "The axe fell"
>
> "a patently discriminatory device."
>
> "successfully avoided decisive action"
>
> "That shot the first semester."
>
> "delaying action"
>
> "discouragingly high obstacles"
>
> "obvious dodges"

"evade"

"completely unjustifiable"

"unconstitutional discrimination"

"inconsistent"

"discriminatorily applied"

"conscious pattern of unlawful discrimination"

"irrationally construed"

"trumped-up excuse"

"determined policy of discrimination by harassment"

"scraping the bottom of the barrel"

"frivolous charge"

"trivia"

"unreasonable"

"insubstantial reasons"

"the veil of innocuity"

"fail the test"

"none so blind as those that will not see"

AND IN CONTRADISTINCTION, these adjectives, adverbs and phrases were applied to Respondent:

"perseverance"

"a man who is having a hard time getting a college education"

"not a gesture of defiance"

"no chip on the shoulder"

"no . . . abnormal concern"

"not unreasonable"

"apparently thoroughly alarmed"

"a man of perseverance"

"a man of patience and politeness"

"laconic style, barren of comment"

"complete and accurate"

"inadvertently"

"open and straightforward"

"polite"

"attentive"

"following the questions"

"understandable"

"sensitive"

"voluntarily"

"a man with a mission and with a nervous stomach"

(cf. Judge DeVane's dissent—"Considered as a brief in support of appellant's case, the decision of Judge Wisdom is a masterpiece.")

The University of Mississippi is an educational institution. Its Chancellor and its Registrar testified without equivocation or contradiction that no qualified applicant had been or would be denied admission to that institution on the grounds of race or color (R. 527; T.R. on Prel. Inj., Plaintiff's Exhibit 16, Page ~~323)~~. The Court of Appeals stated that no statute limits admission to the

University of Mississippi on account of race, creed or color. The Board of Trustees testified that they had not taken any action whatsoever with respect to limiting the admission of negroes to the University of Mississippi since the date of this court's decision in *Brown v. Board of Education,* 349 U. S. 294, 99 L. Ed. 1083, 75 S. Ct. 753, (R. 498, 504, 506, 515, 534, 546, 551-552, 553, 555-556, 557).

Despite the uncontradicted proof in the record and despite the trial court judge's determination, supported by credible and substantial evidence, that no discrimination was applied in the registrar's ruling on Respondent's application, the Court of Appeals *inferred* that the application was turned down solely because the applicant was a negro. With deference to the Honorable Court of Appeals, we submit that its inference was unwarranted and erroneous. *U. S. v. National Real Estate Boards,* 339 U. S. 485, 94 L. Ed. 1007, 70 S. Ct. 711.

This amounts to the substitution of speculation for proof, which is not permissible under the decisions of this Court. *Moore v. Chesapeake & Ohio R. R. Co.,* 340 U. S. 573, 95 L. Ed. 574, 71 S. Ct. 428; *Galloway v. U. S.,* 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077.

Where the uncontradicted proof is that discrimination was not and will not be practiced, inferences cannot be drawn which will produce a contrary finding or result. *Pennsylvania R. R. Co. v. Chamberlain,* 50 F. 2d 734, cert. den. 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 93.

As one instance of the appellate court's reasoning, which we respectfully submit is not logically correct, we would direct this Court's attention to the comments in the opinion concerning the results of Respondent's examination of the files of students who were *denied ad-*

mission to the same summer session of the University to which his application was denied. Lengthy proof was made in an attempt to show that each of these students who were denied admission had scholastic records which were not as good as that possessed by the Respondent. In the absence of the showing of even *one* student who was *admitted* to these sessions with a record similar to or not as good as that possessed by Respondent, the appellate court inferred that he had been the subject of discrimination. With all due deference, we submit that it is illogical to conclude that any quantum of proof that others were *denied* admission can constitute proof of discrimination. Even if it be granted, for the sake of argument, that Respondent was the best of all those denied admission, it cannot substitute for proof that some others not as well situated were *admitted*. On the other hand the very fact that Respondent made such a lengthy examination into and proof of the application of the University's regulations concerning admissions from non-accredited schools carries the connotation that Respondent recognized the University's right, if not responsibility, to have this reasonable standard governing the class of institutions from which transfers would be accepted.

Being mindful that, under the rules promulgated by this Court, decisions of fact made by a trial court are not to be set aside on appeal unless clearly erroneous, and due regard is required to be given to the opportunity of the trial court to judge the credibility of the witnesses, [Federal Rules of Civil Procedure, Rule 52(a)], we would respectfully direct the Court's attention to the following analysis and finding by the Honorable Fifth Circuit. In the course of cross-examination about Respondent's registration to vote in Hinds County, Mississippi (at the same time he was claiming to the University of Mississippi that he was a resident of Attala County), counsel for Petitioners asked Respondent if he swore that the contents of an application for poll tax were true. His answer was:

"A. Yes, sir."

The questioning continued, with Petitioners' counsel asking if the oath was made by Respondent at a time when Respondent knew it was untrue. The answer was:

"A. Maybe I did, but the circumstances was such . . ." There followed an explanation that he had orally told the Registrar that he was not a resident of Hinds County. He was just there as a student. This question and answer then followed:

"Q. My question is, James, you knew it was untrue?

"A. Yes, sir."

(Plaintiff's Exhibit 16, pages [illegible], 86.)

The trial judge before whom this testimony was given, referring to Respondent, stated:

> "He admitted that he knew he was not a citizen of Hinds County, but that he knew he was a citizen of Attala County, and finally, on cross-examination, he admitted that he knew he was swearing falsely when he swore to the Registrar of Voters in Hinds County, Mississippi that he was a citizen of that county."

The Court of Appeals, on the basis of the written record alone and without the opportunity of the trial judge to hear and see the witnesses' inflections and demeanor, stated that the affirmative answers given by the Respondent "simply indicated" that Respondent "was attentive and following the questions."

We respectfully submit that in going beyond the findings of the District Court and in making original determinations of fact, especially findings of fact on which the lower court, on the basis of substantial evidence, had clearly indicated a contrary determination should be made, the Honorable Court of Appeals for the Fifth Circuit exercised not appellate review jurisdiction but original jurisdiction contrary to the spirit and intent of said Rule 52 (a) and the statute vesting only appellate jurisdiction in said court, Title 28 *U. S. Code*, Section 1291.

The appellate court, we submit, followed another incorrect and untenable line of reasoning when it deduced that the Board of Trustees had some sort of affirmative duty on the day of the *Brown v. Board of Education* decision by this Court to adopt a resolution or commit some other positive act amounting to a "me too" adoption, ratification or approval of this Court's ruling and, that, failing in making proof of such an act, there would be a type of presumption or inference that the Board was engaged in unconstitutional discrimination. According to the Court of Appeals, the Respondent, in meeting the burden of proof which he assumed as Plaintiff in the trial court, thus was not required to offer proof that he (1) was qualified; (2) filed a proper application, (3) was denied admission because of constitutionally impermissible discrimination. Rather, the Court of Appeals ruled that the Board's failure to take action gave rise to a presumption that they were violating the Constitutional rights of plaintiff. We submit the proper presumption should have been exactly the opposite, to-wit: Public officials will fairly and evenly perform their duties according to law.

In the course of its opinion, the Court of Appeals declared Respondent to be "just about the type of negro who might be expected to try to crack the racial barrier of the University of Mississippi; a man with a mission and with a nervous stomach" (A. 76). It is abundantly clear from the decisions of this court that any state action in which race, color or creed is the determinant for granting or withholding rights or privileges, is constitutionally impermissible; but it is equally axiomatic that no state's institutions of higher learning are bound to admit as students persons who do not seek to enroll in furtherance of educational purposes. Respondent's motives in applying for admission to the University of Mississippi must be of prime consideration to the officials of that University in determining the propriety of his application and admission as a student. While Respondent cannot be denied admission because he is a negro, it is equally true that his race does not entitle him to special treatment or consideration. The University of Mississippi is not a "missionary" institution. It does not exist except to accomplish its purpose:

> "The University is a community of teachers and students bound together by a common love for learning and by their cooperative efforts to preserve and increase our intellectual heritage." (Plaintiff's Ex. 42 on Temporary Injunction) (A, 127).

The Registrar's uncontradicted testimony was that he would have no choice but to deny Respondent's application, if it were reviewed at that time [January 16, 1962] (R. 670), for the reason that he was convinced that

Respondent was a man who was trying to make trouble because he was a negro and had a race-based psychological problem (R. 683). He continued, stating:

> "I have seen some of the material to which he testified that he had knowledge and that he participated in the publication, which indicates to me a man that is not trying to be a student for the sake of learning a profession or getting an education, but a man who has got a mission in life to correct all the ills of the world; so I am convinced this man is a trouble maker and I think he would be a very bad influence at my institution." (R. 683).

The record contains substantial evidence to support the Registrar's conclusions. Just because an individual judge or justice would act differently from the Registrar if that judge held such a position with the University is not a sound reason for assuming the powers and prerogatives of the Registrar's office. The Registrar's decisions should be accepted absent a clear showing of abuse of discretion, which this record does not disclose. Respondent would not be admitted as a student if he were a chinese, eskimo, white man or member of any other race. Indeed, it is doubtful that any court would even entertain such a suit as this without employing the obtuse or deductive reasoning apparently employed by the Court of Appeals that because this case arose in Mississippi, and because the plaintiff is a negro, therefore, unconstitutional discrimination will be presumed and he must be entitled to special, not equal treatment, and special, not usual relief, far over, above and beyond the prayer of his Complaint.

II.

The Honorable Court of Appeals for the Fifth Circuit erred in ordering the entry of class action relief in this cause.

It is Petitioners' position that no relief should have been granted in this cause to the Respondent, but it is particularly submitted that the Honorable Court of Appeals erred in granting class action relief in this cause.

Federal Rules of Civil Procedure, Rule 23 (a), defines the prerequisite proof which must be made before class actions are premitted.

(1) The persons constituting the class must be so numerous as to make it impracticable to bring them all before the Court;

(2) The one or more bringing suit must demonstrate that they adequately represent all who may sue or be sued as such class; and

(3) That there must be a common question of law or fact affecting the several rights of the members of the class and common relief must be sought.

The only place in the record in which any mention is made of these prerequisites is in Paragraph 4 of the Complaint (R. 5). The allegations of this paragraph were denied under oath (R. 10). No proof whatever was offered on this point. Neither the trial court nor the appellate court made or purported to make any determinations with regard thereto. cf: *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69; *Weeks v. Bureco Oil Co.*, 125 F. 2d 84; *Moore's Fed. Practice & Procedure*, Vol. 3, § 23.04.

Class actions under Rule 23 (a) (3) are characterized as "spurious" actions. They are a permissive joinder device—merely an invitation to join in the action. *Moore's Fed. Practice & Procedure*, Vol. 3, § 23.10. No person other than Respondent has joined or sought to join or was shown to be represented or to have requested representation in this action. We respectfully submit that to grant class action relief in such a posture of the record is a clear violation of the provisions of the rules and correct practice.

III.

The Honorable Court of Appeals erred in issuing and directing the lower court to issue a mandatory injunction requiring respondent's admission at mid-session and denying the Registrar and other officials of the University of Mississippi the discretion to act as such officials on Respondent's application without notice or hearing.

This Court is clearly committed to the rule that a college has the right to dismiss a student at any time to preserve the ideals of scholarship or a moral and proper educational atmosphere. Such a dismissal may properly follow from refusal to abide by state requirements that the student disaffirm allegiance to social fraternities or accept the burdens of military training, or school disciplinary regulations or from the creation of disturbances. A fortiori, an applicant for admission may be denied admission on the same or any similar basis. *Waugh v. Board of Trustees*, supra; *Hamilton v. Board of Regents*, supra; *Steier v. New York Commission*, 271 F. 2d 13, Cert. den. 361 U. S. 966, 4 L. Ed. 2d 547, 80 S. Ct. 587; *Lucy v. Board*, 134 F. Supp. 235, aff. 228 F. 2d 619. It is also proper and reasonable for the officials of the University of Mississippi to conduct the schooling offered by the University on the basis of organized semesters and sessions which have a time of beginning and close at which classes are commenced and continued on a timed schedule, yet, the orders of July 28, 1962 place it entirely at Respondent's option as to whether he will enroll himself in the middle of this present session or "in September", without any specification in regard to the commencement of the September term.

The strong arm of Equity, its injunctive process, should not be so utilized to overrule a positive and reasonable regulation of a university, nor should it be used to so absolutely deprive the regular officials of the University of the discretion which this Court has expressly held they possess. Even if the Court were convinced Respondent had been wronged by Petitioners, (which he has not) the injunctive process should not be used punitively as is here done. Disruption of the University's schedules cannot aid any educational purpose.

The injunction also compels Respondent's admission *now* on the basis of facts apparent from a record, which has been closed for six and one-half months. Such admission is commanded without regard to facts or circumstances which may have occurred in the interim or facts learned since the trial that may have an immediate or important bearing on his admission or qualifications. With all deference and respect, we submit that the mandatory injunction issued *without notice or hearing* was improvident, inequitable and incorrect and should be set aside. While it is recognized that the Federal Rules of Civil Procedure are not directly applicable to Courts of Appeal, we submit that they set a practical and equitable guide for what is considered by this Court to be appropriate procedure with regard to the issuance of injunctions. cf. *Federal Fules of Civil Procedure*, Rule 65 (a-d), (A. 117).

IV.

The action of the Honorable Court of Appeals resulted in the decision of an important state question in a way to conflict with the applicable Constitution and Laws of the State of Mississippi.

Section 213-A of the Mississippi Constitution of 1890 vests the management and control of all state institutions of higher learning of the state in a Board of Trustees constituted under that section. This Board promulgated a ruling requiring applicants for admission to universities and colleges under its jurisdiction and supervision to submit certificates as to their good moral character and recommendations for admission to the university or college applied for from alumni of that school residing in the county of the applicant's residence. Non-residents of the state were required thereby to furnish similar certificates and recommendations from responsible citizens (not necessarily alumni) in their community. (A. 124).

Respondent recognized the validity of the spirit and intent of this requirement and submitted such certificates and recommendations from citizens in the community wherein he claimed to reside. However, the Court of Appeals ruled that the regulation was invalid and that negroes could not be required to furnish such certificates and recommendations, either from alumni *or from citizens generally* (a position even Respondent was unwilling to adopt). The Court recognized the Board's regulation as an administrative order having an effect similar to a statute, but held that they had the power to declare such regulation "manifestly" unconstitutional, thereby dispensing with any necessity for the convocation of a three-judge court under Title 28, *U. S. Code*, Section 2281.

This question has never been presented to or ruled upon by this Honorable Supreme Court. With deference, Petitioners submit that this regulation is neither "manifestly" nor otherwise unconstitutional. Indeed, the Court of Appeals, while partially invalidating the regulation (as to negroes only) held that good moral character was a proper requirement for college admission and attendance.

Colleges and Universities certainly should be able to require an applicant to demonstrate, in connection with his application, some reasonable evidence of his suitability as a student from the standpoint of moral character and ability to pursue college level work. If the ruling of the Honorable Circuit Court of Appeals is correct, then the burden of the regulation falls only on members of races other than the negro race and there is *created by such ruling* an impermissible race-oriented state action.

The basis for this ruling is indicated to be the paucity of college alumni of the negro race. At some indeterminate future date, under the present rulings of this court, the number of such negro alumni must be calculated to increase. When the number will be sufficient to overcome the aspect of numerical inequality is left in doubt, and, as stated, the Court of Appeals recognized that, disregarding such number differences, there should be no doubt as to the Board's power to utilize such an avenue of information.

Altogether the question as to the invalidity of the regulation, especially where Respondent made no attempt whatsoever to secure such recommendations, should have received the consideration required by Section 2281; that is, it should have been determined by a Court composed of three judges where its meanings and ramifications would have received the statutorily required consideration and determination.

V.

The actions of the Honorable Court of Appeals for the Fifth Circuit subsequent to the issuance of its mandate constitutes such a departure from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's supervision.

On the 17th day of July, 1962, the Court of Appeals issued its mandate to the lower court. Since that date this Supreme Court has rendered no decision or order directly or indirectly affecting the parties or subject matter of this action. No change of position or circumstance has occurred with respect to the subject parties. The only thing which has occurred subsequent to the issuance of such mandate was the grant of a stay of the execution and enforcement of the mandate for a reasonable time under the provisions of Title 28, *U. S. Code,* Section 2101 (f), to enable Petitioners to file this petition for certiorari in this Court.

Rule 32 of the Rules of the U. S. Court of Appeals for the Fifth Circuit provides that "a mandate once issued will not be recalled, except by the court *and to prevent injustice.*" We respectfully submit that the issuance of the stay by the Court of Appeals Judge under the clear provisions of statute, could not constitute an "injustice" within the meaning of its rules. No power existed in the Court to recall its mandate in this instance, and its subsequent proceedings contrary to its own rules were without its jurisdiction and power and therefore a nullity.

When such stay order was granted, the judge granting the same accepted both the motion for the stay and the order granting the stay for filing, marked each such instrument "Filed" and directed the counsel who presented the same to immediately deliver these instruments to the office of the clerk of the Fifth Circuit in New Orleans. This was done on July 18, 1962. Counsel at that time requested the clerk to furnish counsel with a certified copy of the stay order signed by the judge. The clerk advised counsel that the "Court" had directed the clerk's office not to take any action whatsoever with regard to such order and not to furnish a certified copy thereof to anyone (see affidavit of counsel, A. 134). Concurrently with the delivery of said order, counsel for Petitioners requested the clerk's office to prepare a certified copy of the record of proceedings in the Court of Appeals and to furnish such certified copy to Petitioners for use in connection with the filing of this petition. This latter request was subsequently reiterated in writing. On July 25, 1962 the clerk advised counsel for Petitioners by letter that he was not "authorized" to furnish a certified copy of the transcript but could only furnish such certified copy when the court ruled upon motions filed with it in accordance with its previous directive (A. 131). On August 2, 1962 the certified transcript was received by counsel. Petitioners respectfully submit that the clerk of a court of record has a duty to furnish copies of public records in his office to any person willing to pay the proper charges therefor, (no question was ever raised concerning the payment or tender) and the action of the Court of Appeals in preventing the clerk from performing these routine duties was erroneous.

On the 20th day of July, 1962, the clerk of said Court of Appeals telegraphed counsel for Petitioners and Respondent that the court directed the parties to file statements of position and memorandum briefs with the said court "for or against the granting of any stays, including the vacating of the stay entered by Judge Cameron, the issuance by this court of injunction pending further appeal, or other appropriate action" (A. 133). On the 27th and 28th days of July, 1962, the Honorable Court of Appeals issued the following:

(1) "ORDER VACATING STAY, RECALLING MANDATE, AND ISSUING NEW MANDATE FORTHWITH," dated July 27, 1962;

(2) "JUDGMENT" dated July 27, 1962, issued as and for the mandate of the court on the same date; and

(3) "ORDER," entered July 28, 1962.

In these instruments the Honorable Court of Appeals stated that it was: recalling its mandate issued July 17, 1962, vacating the statutory stay granted under Title 28, *U. S. Code*, Section 2101 (f) on the grounds that it was unthinkable that a judge not possessed of the knowledge and information gained as a participating panelist could act under said statute to grant a stay pending application for certiorari to this court; *immediately* issuing a judgment as and for the mandate of the court on the date said decision was made, (cf. Rule 32 of said court's rules providing in part, "Mandate shall issue at any time *after* 21 *days* from the date of the decision, unless an application for rehearing has been granted or is pending."); issuing a preliminary injunction without notice or hearing against public officials of Hinds County, Mississippi not parties to this action, enjoining them from proceeding with a criminal action; and, mandatorially enjoining Petitioners to immediately admit Respondent to the University of Mississippi during the course of the second summer session, or, at Respondent's option, to admit him "in September," and further mandatorially enjoining Petitioners from excluding Respondent from continued attendance at the University for an unspecified length of time.

This action was in the form of an injunction issuing directly from said Court of Appeals.

Petitioners respectfully submit that these proceedings constituted such total and unique departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision to correct such departures.

Section 2101 (f) of Title 28, *U. S. Code*, clearly delineates the powers which Congress intended to vest in members of the judiciary to grant stays of the execution and enforcement of orders made by final appellate courts of states and intermediate appellate or lower courts of the Federal Judiciary in connection with the review of decisions of such courts by this Honorable Supreme Court which is, under the Laws of these United States, the *final arbiter* of judicial correctness. The statute does not contemplate or require a judge of the court rendering the decision, or a justice of this Honorable Court to be possessed of any particular modicum of knowledge or familiarity with the intricacies of the proceedings involved.

This Court in deciding whether or not a Writ of Certiorari should issue will consider whether the trial court judge and the dissenting member of the Court of Appeals panel were correct in their determination that the Respondent was not a proper applicant or whether the other two judges of the Court of Appeals were correct in their inferences that Respondent was the subject of unconstitutional discrimination. Petitioners respectfully submit, however, that it was both illogical and improper for the Court of Appeals to set aside the statutory stay on the basis that they could not be wrong in their determinations. One of this Supreme Court's principal functions is to review determinations of inferior appellate tribunals to make their own determinations of errors or correctness in proceedings there.

The judge who granted the stay was obviously of the opinion that if there was error in the Court of Appeals' determination, it was more important to preserve the educational atmosphere of a university from the effects of Respondent's determination to accomplish his own "missionary" or non-educational objectives than it was, if such decision be correct, to secure the instantaneous transfer of Respondent from a college where he could have achieved an undergraduate degree already to a school where he must necessarily remain for a minimum of a year (A. 128).

Respondent waited more than nine (9) years after his high school graduation to even make application to attend the University of Mississippi. The time required to permit this Court's review is certainly relatively inconsequential.

The principles governing the vacating of such a stay have been thoroughly considered and reviewed and discussed by this court in the case of *Rosenberg v. U. S.*, 346 U. S. 273, 97 L. Ed. 1607, 73 S. Ct. 1152. In that case this court pointed out that *it* had the inherent power to vacate a stay, which power "derives from *this* court's role as the *final forum* to render the *ultimate answer* to the question which was preserved by the stay."

Petitioners respectfully submit that it is more appropriate for a single judge to stay the execution and enforcement of a Judgment and Mandate issued pursuant to the opinion of two judges of the Court of which he is a member, than for any number of judges of an intermediate appellate or state court, whose decisions are subject to final appellate review in this Court, to act to set aside such a statutory stay procedure pending review by this Court.

A question arises here which transcends the Court of Appeals' two to one determination that Respondent should prevail. It is a matter of how orderly and correct judicial determination of a controversy lodged with the courts should proceed and be reviewed by this court. Petitioners respectfully submit that this procedural question should not be dispensed with by a ruling either way on the merits of the petition. Justices of this court are frequently requested to grant stays of the type granted by Judge Cameron. If the court adopts the reasoning of the Court of Appeals, then no Justice could act on such a stay unless he participated in the panel's discussions and deliberations. Section 2101 (f) should not be so strictly construed. This procedure is one in which liberal or conservative, federalist or states' righter, white or negro, all should have a common and equal interest. It may well be that Mr. Justice Black's remarks in his dissent in *Beauharnais v. Illinois*, 343 U. S. 250, 96 L. Ed.

919, 72 S. Ct. 725, are completely apropos here. To hold that in all cases a majority of Court of Appeals or other inferior tribunal must have the ultimate right to control actions under Section 2101 (f) might, in the future, qualify with any one of such special interest groups for the description: "One more such victory and we are undone."

CONCLUSION

It is respectfully submitted that certiorari should issue to the Court of Appeals to review the decisions above enumerated so that this Court can decide the serious and important questions presented by this Petition.

Respectfully submitted.

CHARLES DICKSON FAIR, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, et al,

PETITIONERS

BY: JOE T. PATTERSON, Attorney General of the State of Mississippi

DUGAS SHANDS, Assistant Attorney General of the State of Mississippi

PETER M. STOCKETT, JR., Special Assistant Attorney General of the State of Mississippi

CHARLES CLARK, Special Assistant Attorney General of the State of Mississippi
P. O. Box 1046
Jackson, Mississippi

By /s/
Charles Clark

CERTIFICATE OF SERVICE

I, Charles Clark, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT on James H. Meredith, Respondent, by mailing true copies thereof to Constance B. Motley, Esq., 10 Columbus Circle, New York, New York, airmail, postage prepaid, and to R. Jess Brown, Esq., 1105-1/2 Washington Street, Vicksburg, Mississippi, by first class mail, postage prepaid (the distance being less than 500 miles), the Attorneys of Record for said Respondent.

Dated this 15 day of August, 1962.

/s/
CHARLES CLARK
Attorney for Petitioners
Post Office Box 1046
Jackson, Mississippi

IN THE UNITED STATES
DISTRICT COURT

FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 3130

JAMES HOWARD MEREDITH Plaintiff

vs.

CHARLES DICKSON FAIR, ET AL Defendants

OPINION OF THE COURT

Plaintiff, James Howard Meredith, is a member of the Negro race and a citizen of Mississippi. He filed his complaint on behalf of himself and of other Negro students in the State of Mississippi similarly situated. He seeks a preliminary and permanent injunction enjoining the defendants from refusing him admittance to the University of Mississippi and for a declaratory judgment. The defendants in the case are members of the Board of Trustees of State Institutions, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University.

The management and control of the University of Mississippi and all other state institutions of higher learning in the State of Mississippi is vested in the Board.

James Howard Meredith filed his complaint on the 31st day of May, 1961 and alleged that he had been deprived of rights secured to him by the Constitution of the United States in violation of Title 42, U.S.C. Sec. 1983.

He alleged that the University of Mississippi is limited by policy and custom to students on a segregated basis only. The defendants answered and denied the material allegations of the complaint, particularly that part where he alleged that he was denied admittance solely because of his race. Plaintiff further alleged that certain rules and regulations of the University of Mississippi have been improperly and unconstitutionally applied to him and avers that he was not accepted as a resident undergraduate transfer student solely because he is a Negro. This was denied by the defendants.

Concurrently with the filing of the complaint plaintiff moved for a temporary restraining order without notice. This application for preliminary restraining order without notice was denied by the Court on the ground that notice of application should have been given to the defendants. Concurrently with the filing of the complaint he also filed a motion for a preliminary injunction and this motion was noticed for hearing on the 12th of June, 1961 at Biloxi, Mississippi, at which time it came on for hearing. This motion specifically related to the summer session of the University of Mississippi beginning June 8, 1961. The motion was called for hearing on June 12 and before the beginning of any proceedings the Court inquired of counsel on both sides as to whether or not the motion was to be heard on affidavits or on oral testimony. Attorney for the plaintiff advised the Court that she desired to proceed on oral testimony and the trial was thereupon begun upon the application for the preliminary injunction. Not having finished the case during that day and because prior to this time other matters had been set for hearing on the following day, the Court recessed this hearing until July 10, 1961. On June 29, 1961 plaintiff filed another motion for preliminary injunction, praying that the Court would enjoin the defendants from refusing to admit plaintiff to the second summer session commencing on July 17, 1961 solely because of his race and color. On July 10, pursuant to the former order of recess, the Court met and at that time was advised that the leading counsel for the defendants was seriously ill and that his physical condition prevented his attendance at the hearing. The Court heard this matter and from the affidavits and from doctors' certificates determined that it would endanger the life of leading counsel if he were compelled to proceed. He is the first Assistant Attorney General of the State and has taken the leading part throughout all hearings and the Court determined that sound discretion dictated out of necessity that it should again recess the hearing to the next available date, which was the 10th of August. On that date counsel for plaintiff announced in open court that she would withdraw her motion for preliminary injunction relating to the date of June 8, 1961 and the Court granted her leave to withdraw that motion and gave her permission to file a later motion, but a later motion was not filed. However, the one that was filed on June 29, 1961 was left pending and it was this motion that was taken up for hearing on August 10 and proceeded to a conclusion on August 16. It is the contention of plaintiff that although the July 17 session—the second summer session—was past, yet it was the duty of the Court to proceed and determine if a preliminary injunction should be granted for the remainder of the summer session or for future terms or sessions of the University of Mississippi. No application had been filed with the authorities of the University of Mississippi other than the one mentionad in the original complaint.

In his original complaint the plaintiff alleged that on the first day of February, 1961 the Registrar of the University of Mississippi received by registered mail an application from the plaintiff for admission to the mid-year or 1961 spring session, which commenced on February 6, 1961. In that application he represented himself to be a citizen of Mississippi, having a permanent address at Kosciusko, in Attala County, Mississippi, and a mailing address in the City of Jackson, Hinds County, Mississippi. In his application he stated that he applied to be classified as a junior in the College of Liberal Arts. The Court finds as a fact that he did make application by that letter and that in response to that request forms for the listing of the names of six alumni residing in the County of plaintiff's residence, who had known plaintiff for at least two years and who would certify him as a person of good, moral character, and would recommend him for admission to the University of Mississippi, but as a matter of fact these forms were never furnished by the plaintiff. Instead, he sent five certificates addressed "To Whom It May Concern," certifying that he was of good moral character, none of which were signed by persons who were alumni of the University of Mississippi. On the 4th day of February, 1961 the Registrar telegraphed plaintiff and all other applicants whose applications had been received after January 25, 1961 that the University had found it necessary to discontinue consideration of all applications for the Spring, 1961 mid-year semester received subsequent to that date. The facts show that this was due to an overcrowded condition existing in the University classrooms and dormitories, which had been recognized and had been under consideration by the University Committee on Admissions since October, 1960 as a part of an over-all plan to upgrade the quality of educational opportunity afforded by the University. This applied to all applications made after January 25, 1961, without any regard to the race or color of the applicant. The testimony shows without contradiction, and I find as a fact, that many other potential applicants who made inquiry about applications subsequent to February 4 were similarly treated and none were permitted to apply for the Spring, 1961 mid-year semester. The testimony shows, and I find as a fact, that there was no discrimination against any student, and particularly the plaintiff, solely because of his race or color with regard to the action of the University of Mississippi in discontinuing consideration of applications for the Spring, 1961 semester after the January 25, 1961 cut-off date.

By letter dated February 20, 1961 plaintiff responded to the Registrar's cut-off telegram by requesting that his application be considered as an application for admission to the Summer, 1961 session beginning June 8. This letter, as well as all subsequent correspondence, was sent to the University by plaintiff by registered mail with return receipt requested, which is an unusual procedure. Again on March 26 the plaintiff wrote the Registrar admitting that his previous five certificates did not comply with the regulations of the University in that they did not recommend his admission to the University of Mississippi and with this letter he enclosed additional letters from the same five people which referred to his good moral character and also recommended him for admission to the University of Mississippi. On April 12, 1961 plaintiff mailed a letter which was prepared by his attorneys to the defendant, Dr. Lewis, who is Dean of the College of Liberal Arts, which stated that plaintiff concluded that the Registrar had failed to act upon his application solely because of his race and color and requesting Dr. Lewis to review his case. In response to that letter the Registrar on May 9, 1961 sent plaintiff a preliminary evaluation of credits indicating a maximum credit allowance at the University of Mississippi or 48 semester hours out of a total of 90 semester hours offered, according to plaintiff's transfer from Jackson State College. On May 15, 1961 the Committee on Admissions at the University of Mississippi met with eight members in attendance. Only two of these eight members had any knowledge that plaintiff had applied to the University of Mississippi. At this meeting no specific instructions or students were discussed. The Committee at that time adopted several regulations. The action of the Committee taken that day affected the award of credit for military training; acceptance of credits from institutions which are not members of regional accrediting associations; and also problems connected with school credits. The undisputed testimony is that the adoption of these particular regulations were considered in terms of the quality of students transferred to the University and the adoption of the regulations was a means of improving that quality and was simply a part of a continuing study and action by the Committee on Admissions to effect such *improvement. The testimony is and I find* as a fact that this action was not taken in any attempt direct or indirect, to discriminate against anyone solely on the ground of race or color.

Later, in a letter received by the University on May 16, 1961, plaintiff stated that he desired to have his application treated as a pending application for admission to the summer session beginning with the first term in

June, 1961. Many of the credits tendered by the plaintiff for admission as a transfer student were denied because they did not measure up to the regulations required of all students who applied for admission to the University. The Jackson State College, where plaintiff was in attendance, was not a member of the Southern Association of Colleges and Secondary Schools.

Plaintiff contends and alleges that he is a citizen of Attala County, Mississippi. The defendants denied this and they contend that he was a non-resident of the State of Mississippi and not a resident citizen of this State, and they cross examined him at length about his various movements and activities. Defendants contend that while he was born in Mississippi, yet he changed his domicile either to Michigan or Indiana and that he never did move back to Mississippi as a citizen, but only came back as a student. On cross examination it was shown that he was married to an Indiana girl and that he claimed Michigan as his residence; that he enlisted in the Army from the State of Michigan and not from the State of Mississippi. Defendants further brought out on cross examination that after he entered Jackson State College at Jackson, Mississippi, he registered in Hinds County, Mississippi and that when he registered in Hinds County, Mississippi he swore falsely that he was a citizen of Hinds County, Mississippi and that this was knowingly done for the purpose of obtaining a registration. He admitted that he knew he was not a citizen of Hinds County, but that he knew he was a citizen of Attala County, and finally, on cross examination, he admitted that he knew he was swearing falsely, when he swore to the Registrar of Voters in Hinds County, Mississippi that he was a citizen of that county. He stated that he had always claimed Attala County as his domicile and still claims it as his domicile. As a result of his false swearing the record shows that he was registred as a voter in Jackson, Hinds County, Mississippi. In determining whether he is a resident of Mississippi or a non-resident of Mississippi I have taken this evidence into consideration, along with all of the other evidence touching on that question. The testimony shows without conflict that he was born and reared in Kosciusko, Attala County, Mississippi; that he finished High School there and thereafter took courses in other schools and while he was in the service, but that during all this time he claimed Attala County as his domicile. The record further shows that while he was in the Army he made investments back in Attala County, having bought two farms there. The record further shows that in order for one to register as a voter in Mississippi he must be a citizen of the state for a period of two years and a citizen of the county and precinct in which he was to register for a period of one year. It is unnecessary to detail further the testimony touching on this question, but I find as a fact from all of the testimony that he was and is now a citizen of Attala County, Mississippi. This holding is supported by the authorities of Texas v. Florida, et al, 306 U. S. 398.

There was a good deal of testimony introduced in the cause, but very little conflict, and the overwhelming weight of the testimony is that the plaintiff was not denied admission because of his color or race. The Registrar swore emphatically and unequivocably that the race of plaintiff or his color had nothing in the world to do with the action of the Registrar in denying his application. An examination of the entire testimony of the

Registrar shows conclusively that he gave no consideration whatsoever to the race or the color of the plaintiff when he denied the application for admission and the Registrar is corroborated by other circumstances and witnesses in the case to this effect. Careful consideration was given to the application and in the honest judgment of the Registrar he did not meet the requirements required of all students at the University. This testimony is undisputed and the testimony of the Registrar was not unreasonable, but on the contrary was given openly and fairly; and in addition to his testimony, of course there is the presumption of law that an official will perform his duties honestly.

The burden of proof, of course, is upon the plaintiff to prove by a preponderance of the evidence that his admission was denied because of his race or color and this the plaintiff has utterly failed to do. The action taken by the Registrar and the other authorities at the University was not based to any extent at all on his race or color and the plaintiff has failed to meet the burden and the motion for the preliminary injunction should be denied.

An order may therefore be drawn denying the motion for the temporary injunction and the case set for final hearing on its merits on January 15, 1962.

This the 12th day of December, 1961.

/s/ S. C. MIZE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19394

JAMES H. MEREDITH, on behalf of
himself and others similarly situated — Appellant

vs.

CHARLES DICKSON FAIR, President
of the Board of Trustees of the state
Institutions of Higher Learning, Et Al — Appellee

Appeal from the United States District Court for the Southern District of Mississippi

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(January 12, 1962)

Before TUTTLE, Chief Judge, RIVES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge:

James H. Meredith is a Mississippi Negro in search of an education. Mississippi is one of three states which have not yet allowed a Negro citizen to seek an education at any of its State-supported, "white" colleges and universities.[1]

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[1] The state-supported colleges in South Carolina and Alabama are also uniracial. The University of Alabama, however, is under order to admit negroes. Lucy v. Adams, N. D. Ala., 1955, 134 F. Supp. 235, affirmed, 228 F. 2d 619, cert. denied, 351 U. S. 931, 350 U. S. 1 (1955)

After graduation from high school at the age of seventeen, Meridith voluteered for the United States Air Force. He was honorably discharged nine years later. During his years in the service, he acquired thirty-four semester credits by attending night courses at the University of Maryland (Far Eastern Division, Tokyo), the University of Kansas, and Washburn University. His A's and B's at the University of Maryland show that he applied himself diligently.[2] In addition, over the years, Meredith attended numerous college level courses offered by the Armed Forces Institute. Jackson State College allowed him fifty-seven quarter hours credit for the work he had taken at the Armed Forces Institute. After his discharge from the Air Forces in the summer of 1960, Meredith returned to Mississippi and enrolled in Jackson State College, a Negro college in Jackson. Throughout his years of seeking to improve himself, he elected to study demanding and challenging subjects indicative of a determined effort to obtain a solid education. In the early part of 1961, Meredith applied for admission to the University of Mississippi. At that time he had about ninety credits. When asked on the witness stand why he wished to transfer from Jackson State College to the University of Mississippi he said that he regarded Jackson State as "substandard."

January 26, 1961, Meredith mailed formal applications for admission to the University of Mississippi. His letter of transmittal informed the registrar that he was a Negro; the forms required a statement of the applicant's race and also required him to attach a photograph. He furnished with his application five certificates from residents of Attala County, each certifying to his good moral character. Meredith's letter to the registrar stated: "I will not be able to furnish you with the names (certificates) of six University Alumni (as required by University regulations for admission) because I am a Negro and all graduates of the school are white. Further, I do not know any graduate personally."

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[2] In the 1958-59 term Meredith was given the grade of B in each of five subjects. In the 1959-60 term he received 3 A's, 4 B's, and 1 F.

February 4, 1961, the registrar wired Meredith that it "has been found necessary to discontinue consideration of all applications for admission or registration for the second semester which were received after January 25, 1961." University officials stated that overcrowding at the University prompted its action.

February 20, 1961, Meredith wrote the registrar requesting that his application be considered "a continuing application for admission during the summer session beginning June 8, 1961." He asked that the registrar advise him whether his transcripts from other universities had been received and whether he had forwarded to the registrar all of the information necessary to make the application for admission complete. In answer, the registrar wrote him that since the University was "unable to accept application for admission," the ten dollars for a room deposit was being returned.

February 23, 1961, Meredith wrote the registrar and again requested that he be considered for admission to the summer session. The registrar did not reply to this letter. March 18, Meredith wrote, requesting that his application "be considered a continuing one for the Summer Session and the Fall Session, 1961." Again he asked "whether there remains any further prerequisites to admission." Not having received a reply by March 26, he wrote the registrar, calling attention to the statement in the Bulletin of the University of Mississippi, 1960 Catalog, that the registrar "will provide each transfer student with an evaluation of the credits acceptable to the University," and asking that he be sent a copy of the evaluation of his credits. In the same letter he forwarded five amended certificates from the same Attala County residents who signed the original certificates, not only attesting to his good moral character, but specifically recommending his admission to the University.

Meredith received no answer from the registrar to any of these three letters. On April 12, 1961, he wrote the Dean of the College of Liberal Arts of the University of Mississippi. This letter (*requested*) the Dean "to review the case with the registrar and to advise Meredith what admission requirements, if any, (he) failed to meet, and to give (him) some assurance that (his) race and color are not the basis for (his) failure to gain admission to the University." This letter produced a reply almost four weeks later. The registrar answered May 9, 1961, stating that the "application had been received and will receive proper attention." As for Meredith's credits, he stated that "under the standards of the University of Mississippi the maximum credit which could be allowed is forty-eight semester hours" of the total of ninety according to the transcripts. Meredith wrote on May 15 and again on May 21, 1961, stating that he still wanted his application considered as pending.

May 25, 1961, the registrar closed his file on Meredith with the following letter:

> "The University cannot recognize the transfer of credits from the institution which you are now attending since it is not a member of the Southern Associa-

tion of Colleges and Secondary Schools. Our policy permits the transfer of credits only from member institutions of regional associations. Furthermore, students may not be accepted by the University from those institutions whose programs are not recognized.

"As I am sure you realize, your application does not meet other requirements for admission. Your letters of recommendation are not sufficient for either a resident or nonresident applicant. I see no need for mentioning any other deficiencies."

May 31, 1961, Meredith filed a complaint in the United States District Court for the Southern District of Mississippi against the Board of Trustees of the State Institutions of Higher Learning of the State of Mississippi, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University. The Board of Trustees, appointed by the governor with the consent of the Mississippi senate, is vested, under the state constitution, with the management and control of all the state institutions of higher learning. The complaint is filed as a class action on behalf of Meredith and all other negro students similarly situated.[3] It seeks to enjoin, at the University of Mississippi and other state institutions of higher learning, the practice of limiting admissions to white persons.

The particular phase of the litigation now before this Court is an appeal from an order of the district court denying Meredith's motion for a preliminary injunction enjoining the registrar at the University from denying appellant's admission solely on account of his race and color. The motion, which was filed with the complaint, asked for specific relief with regard to the summer term beginning June 8, 1961, but the pleadings and the hearings show that the plaintiff sought admission to the next available term, summer session or regular session. The hearing on the motion was set for June 12, 1961, four days after commencement of the first summer term. About 3:30 p.m. on the afternoon of the hearing the district judge stopped the hearing and continued the case, on the ground that he had set aside only one day to hear the case, because of his crowded docket. The case was continued until July 10, 1961, at which time, according to the court, the entire case would be heard since, in the interim, the answer would have been filed. The case could not be heard on July 10, however, because it conflicted with the trial of a special three-judge court case.

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[3] The complaint invokes the jurisdiction of the court and 28 USCA §1343(3), alleging deprivation of rights in violation of (1) the due process and equal protection clauses of the Fourteenth Amendment and (2) 42 USCA §1983.

Since it was apparent that the first summer term would be over before the case would be heard, the appellant filed another motion urging the court to grant a preliminary injunction before commencement of the second term on July 17, 1961. The motion was fixed for hearing on July 11, 1961. On July 10, the chief counsel for the appellee, an assistant attorney general for the state, was ill. The case was therefore continued until August 10, 1961.

In the two months' interim between filing of the complaint and the hearing August 10 the plaintiff made five unsuccessful attempts to take the registrar's deposition. The first motion was denied on the ground that the deposition could not be taken before the expiration of twenty days from the filing of the complaint. The second was denied because of the assistant attorney general's ill health. The last three were denied on the grounds that the court was "in the process of trial on plaintiff's motion for temporary injunction and in the exercise of (the) court's discretion."

The plaintiff moved for the production of records of all students admitted to the February 8, 1961, term, the 1961 summer term, and the September 1961 term for inspection by the plaintiff's counsel. This motion, filed on June 20, was not heard until July 27, again because of the assistant attorney general's ill health. On August 1 the district judge entered an order allowing inspection of certain records, limiting the inspection, however, to applications for admission of "regular undergraduate transfer students for enrollment in the 1961 summer session."

The registrar filed his answer July 19, 1961, denying that any state law, policy, custom or usage limits admissions to the University of Mississippi to white persons and denying that Meredith had been refused admission solely because of race or color. The registrar averred that Meredith was denied admission because: (1) he had failed to submit requisite alumni certificates; (2) he was not seeking admission in good faith; (3) under established rules of the Board of Trustees no institution is required to accept a transfer student unless the program of the transferring college is acceptable to the receiving institution and in this case the previous program of Jackson State College is not acceptable to the University because Jackson State College is not a member of the Southern Association of Colleges and Secondary Schools; and (4) for the reasons assigned in the registrar's letter of May 25, 1961 to Meredith.

On August 10, 1961, the hearing was resumed. August 11 it was continued until August 15 in order to allow the assistant attorney general to appear in another case. The hearing resumed August 15 and was concluded on August 16.

The district judge allowed the appellee until September 5, 1961, to file a brief and gave the appellant until September 21 in which to file a reply brief. The last summer session was over on August 18. The first semester of the 1961-62 school year began September 28, 1961.

The district judge rendered his decision December 12, 1961, denying the plaintiff's motion for a preliminary injunction. The court set the case for trial on the merits on January 15, 1962.

In its opinion, which the district court treated as "findings of fact and conclusions of law," the court made these findings: (1) Meredith never presented the alumni certificates required for admission; (2) denial of Meredith's admission in February 1961 was based on overcrowding at the University; (3) on May 15, 1961, the Committee on Admissions decided, without any attempt to discriminate, to raise scholastic standards by accepting "credits only from institutions which are members of a regional accrediting association or a recognized professional accrediting association;" (4) Jackson State College was not a member of the Southern Association of Colleges and Secondary Schools[4] and, therefore, many of Meredith's credits were not acceptable to the University. The district court ruled that "the overwhelming weight of the testimony is that the plaintiff was not denied admission because of his color or race."

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[4] The University regulation adopted May 15, 1961 provides that the University will "accept credits only from institutions which are members of a regional accrediting association **or a recognized professional accrediting association.**"

Jackson State College is accredited by the Mississippi College Accrediting Commission and the council on Study and Accreditation of Institutions of Higher Learning. The College Accrediting Commission is a statutory body (Miss. Code, 1942, §6791.5). The registrar testified that he knew of his own knowledge that Jackson State College was accredited by that Commission.

The appellant filed his notice of appeal on December 14, the day the court below entered its formal order. December 18, appellant moved for an order advancing the date of the hearing of his appeal. This Court granted and heard the appeal January 9, 1962.

I.

This case was tried below and argued here in the eerie atmosphere of never-never land. Counsel for appellees argue that there is no state policy of maintaining segregated institutions of higher learning and that the court can take no judicial notice of this plain fact known to everyone. The appellees' chief counsel insists, for example, that appellant's counsel should have examined the genealogical records of all the students and alumni of the University and should have offered these records in evidence in order to prove the University's alleged policy of restricting admissions to white students.

We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges.[5] Cf. United States v. Harpole, 5 Cir., 1959, 263 F. 2d 71, cert. denied, 361 U. S. 850.

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[5] Mississippi's strong policy in favor of segregation is reflected in its statutes. Mississippi, in addition to enacting a resolution of interposition, enacted a statute requiring all members of the executive branch of the state government to prevent implementation of Brown v. Board of Education and enforce segregation in the public schools and other public facilities "by any lawful, peaceful and constitutional means" (Miss. Code, 1942, §4065.3). There is no statute limiting admissions to the University of Mississippi but Mississippi State College is limited to white males (Miss. Code, 1942, §6694); Alcorn Agricultural and Mechanical College was established in 1878 for the education of the colored youth (Miss.

The existence of this policy is an important factor in determining the purposes and effects of statutes and actions superficially innocuous. The existence of the policy and its effect as a guiding force, however, do not relieve the plaintiff of the necessity of showing in this case that the policy was applied to him to produce discrimination on the ground of race. James Meredith, like any applicant for admission to a university, may be denied admission on non-discriminatory grounds.

II.

We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to negro candidates. It is a heavy burden on qualified negro students, because of their race. It is no burden on qualified white students.

Code, 1942, §6703); Mississippi State College for Women is also limited to white students (Miss. Code, 1942, §§6711 and 6714); Jackson State College for Negro Teachers, now known as Jackson State College, is the institution of higher learning which appellant now attends (Miss. Code, 1942, §§6808-01, 6809). The Board of Trustees has statutory authority to provide graduate and professional instruction for Negro youth outside the State "when such instruction is not available for them in the regularly supported institutions of higher learning" (Miss. Code, 1942, §6726.5). Moreover, in 1959 the State Sovereignty Commission of Mississippi issued a report on the state's Negro and white schools, teachers and colleges. This report states the following:

> "The 1958-1959 allocation of state appropriated funds for Senior Colleges broken down on the basis of the amount allocated per student, is as follows:
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> | | | |
> |---|---|---|
> | [illegible] | Alcorn A. & M. College—(Negro) | $747.65 |
> | 2. | Mississippi Vocational—(Negro) | 725.09 |
> | 3. | University of Mississippi—(white) | 675.69 |
> | 4. | Delta State College—(white) | 652.54 |
> | 5. | Miss. State College for Women—(white) | 552.53 |
> | 6. | Jackson State College—(Negro) | 476.47 |
> | 7. | Mississippi State University—(white) | 454.67 |
> | 8. | Mississippi Southern College—(white) | 387.10 |

4 Race Relations Law Reporter 467 (1959). There is a state constitutional provision and several state statutes requiring segregation in the public schools. E. g., Miss. Constitution, 1956, Art. 8, §207; Miss. Code, 1942, §§6220.5, 6328-03.

The fact that there are no Negro alumni of the University of Mississippi, the manifest unlikelihood of there being more than a handfull of alumni, if any, who would recommend a negro for the University, the traditional social barriers making it unlikely, if not impossible, for a negro to approach alumni with a request for such a recommendation, the possibility of reprisals if alumni should recommend a Negro for admission, are barriers only to qualified negro applicants. It is significant that the University of Mississippi adopted the requirement of alumni certificates a few months after Brown v. Board of Education was decided.

In Ludley v. Board of Supervisors Louisiana State University of E. D. La., 150 F. Supp. 900, aff'd 252 F. 2d 372 (1958, cert. denied, 358 U. S. 900 (1958), a somewhat similar requirement was invalidated. There, a statute required for admission to state universities a certificate of good moral character addressed to the particular university by the principal of the high school from which the applicant was graduated. Negro high schools were furnished certificates addressed only to negro colleges. This Court held that the purpose and effect of the statute was to discriminate against Negroes. More recently, in Hunt v. Arnold, N. D. Ga., 1959, 172 F. Supp. 849 (not appealed), the court held that an alumni certificate requirement of the University of Georgia, adopted in 1953, was unconstitutional. In that case the court said: "The Court takes judicial notice of the fact that it is not customary for Negroes and whites to mix socially or to attend the same public or private educational institutions in the State of Georgia, and that by reason of this presently existing social pattern, the opportunities for the average Negro to become personally acquainted with the average white person, and particularly with the alumni of a white educational institution, are necessarily limited.''

To the extent, therefore, that the University of Mississippi relied on the requirement of alumni certificates and recommendations, Meredith was discriminated against in violation of the equal protection clause of the Fourteenth Amendment and was unlawfully denied admission to the University.

III.

That holding does not dispose of the case. The state of the record is such that it is impossible to determine whether there were valid, non-discriminatory grounds for the University's refusing Meredith's admission. Considering the state of the record and considering that the trial on the merits heretofore set for January 15, 1962, can be held at an early date, we feel that it would promote the proper disposition of the case if in declining to reverse the denial of the preliminary injunction we made the following observations for the guidance of the district judge presiding at the trial on the merits.

A. First, the transcript and the deposition taken in the presence of the trial judge show that the counsel for the defendants was allowed so much latitude while at the same time the counsel for the plaintiff was so severely circumscribed in the examination of witnesses, introduction of evidence, and argument that the record contains a welter of irrelevancies and, at the same time, a conspicuous omission of evidence that should be helpful to a proper determination of the case.

B. The limitation of evidence to that pertaining to the summer session of 1961 is clearly erroneous. It is erroneous since the policy and practice of the University in admissions were at issue. It is erroneous because Meredith made it plain that his application for admission was intended as a continuing application, to the regular term as well as to the summer term of the University.

C. In oral argument on appeal, counsel for both parties called to the attention of this Court that since the hearing below Jackson State College has been approved by the Southern Association of Colleges and Secondary Schools. This fact has a material bearing on the issue.

D. It is not clear from the record whether the University gave any effect to Meredith's credits from the Universities of Maryland, Kansas, and Washburn, and the twelve acceptable credits from Jackson State College, although a letter of the Registrar seems to accept forty-eight credits.

E. It is not clear from the record whether the University's references to Jackson State College mean that Meredith was rejected simply because he had attended that college or he was rejected because the University could not accept *all* of Jackson State College's credits. (Apparently, although this too is unclear, the University accepted twelve credits Meredith submitted from Jackson State.)

A full trial on the merits is needed in order to clarify the muddy record now before us. *Within proper legal bounds,* the plaintiff should be afforded a fair, unfettered, and unharassed opportunity to prove his case. A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it.

Accordingly, the order of the district court denying appellant's motion for a preliminary injunction is AFFIRMED. The motion of the appellant that this Court order the district court to enter a preliminary injunction in time to secure the appellant's admission to the February 6 term is DENIED. It is suggested that the district judge proceed promptly with a full trial on the merits and that judgment be rendered promptly, especially in view of the fact that a new term of the University of Mississippi begins February 6, 1962. The Court's mandate will be issued forthwith.

IN THE UNITED STATES
DISTRICT COURT

FOR THE JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 3130

JAMES HOWARD MEREDITH

vs.

CHARLES DICKSON FAIR; ET AL

OPINION OF THE COURT
FINDING OF FACT AND CONCLUSIONS OF LAW

Plaintiff, James Howard Meredith, is a member of the Negro race and a citizen of Mississippi. He filed this suit against the members of the Board of Trustees of State Institutions, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University. He alleged that he sought admission to the University of Mississippi as a resident, under-graduate, transfer student to that Institution and that he was denied admission solely because of his race. The complaint was answered by the Defendants, denying that he was refused admission solely because of his race. A motion for preliminary injunction was filed and a full and complete hearing upon the motion for the preliminary injunction to enjoin the Defendants from refusing to admit him was had by the Court and on December 12, 1961 his motion for preliminary injunction was denied and the Court set the case for final hearing on January 15, 1962. After fully hearing all the evidence and considering the record on the motion for a preliminary injunction the Court held that the Plaintiff was not denied admission because of his race. The Plaintiff filed his notice of appeal from that judgment on December 14, 1961 to the Court of Appeals for the Fifth Circuit, which appeal was heard on January 9, 1962 and the opinion rendered by the Court of Appeals on January 12, 1962, affirming the judgment of the District Court, and the Court of Appeals denied the motion of the Plaintiff to order the District Court to enter a preliminary injunction in time to secure the Plaintiff's admission to the February 6 term of the University.

The statement of the pleadings and the background of the facts leading up to the filing of the suit are contained in the opinion of the District Court which was filed on December 12, 1961 and which is reported in .... Federal Supplement .... (not yet reported). The opinion of the Court of Appeals is not yet reported, but will appear in the Advance Sheets of the Federal Reporter in the near future. The style of the case in the Court of Appeals is "James H. Meredith, on behalf of himself and others similarly situated versus Charles Dickson Fair, President of the Board of Trustees of the State Institutions of Higher Learning, et al."

The only question now posed for decision is whether or not the Plaintiff was denied admission to the University of Mississippi solely because of his race or color and only a question of fact appears for determination.

After the Mandate came down from the Court of Appeals a hearing of the controversy was begun in the

District Court on the final merits on the 17th of January and was concluded on the 27th of January, and after oral argument was submitted to the Court for decision. During this hearing many additional witnesses testified, principally the parties to the suit, and in addition thereto all the testimony that was given on the hearing for the preliminary injunction was introduced into evidence along with all of the exhibits, and several questions of law relative to procedure were raised.

The Plaintiff obtained a subpoena duces tecum addressed to the Registrar of the University to bring with him certain records pertaining to the admission and denial of all the transfer students from the summer term to the date of the trial. The Defendants moved to quash the subpoena duces tecum, which was overruled, and the Plaintiff moved for an inspection of the documents to be produced under the subpoena duces tecum before placing the Registrar on the witness stand. The Defendants objected to this procedure on the ground that the only way Plaintiff could obtain inspection of the documents was by motion under Rule 34, showing good cause for the inspection and production. The Court overruled this objection and stated that in this particular instance it was permissible to look through the shell of the subpoena to bring with him the documents and go to the substance and that rather than delay the trial to permit a motion under Rule 34, the Court would require the Registrar to bring the applications and all correspondence pertaining thereto with reference to all students from the summer school up to the date of the trial, and would permit the Plaintiff to inspect those documents without making a motion under Rule 34, for the reason that it was apparent that there was sufficient good cause appearing that the

Plaintiff would be entitled to inspect the documents with reference to transfer students situated as was the Plaintiff. Rule 34 of the Federal Rules of Civil Procedure, of course, requires that when one is in possession of documents that are material to the issues in a lawsuit, he may be required to produce them on motion and on showing of good cause, but in this particular case it was proper and not error for the Court to rule as it did. Plaintiff alleges and contends that he was denied admission solely because of his race. Defendants categorically deny that he was denied admission because of his race and aver that his race had no bearing at all on the rejection of his application for admission.

As held on the hearing on motion for preliminary injunction, the evidence overwhelmingly showed that the Plaintiff was not denied admission because of his race. The Plaintiff, during this hearing on the merits, called as adverse witnesses nearly every member of the Board of Trustees, who testified unequivocally and definitely that at no time had the question of the race of a party ever been discussed at a meeting of the Board of Trustees or at any other place and that so far as the members of the Board of Trustees was concerned, all policies and regulations were adopted and followed without regard to race, creed or color, and that at no time was the application of James Meredith, the Plaintiff, ever discussed by any members of the Board of Trustees. The Registrar, who also had testified on the motion for preliminary injunction, again testified to the effect that the question of the race of the Plaintiff was not discussed or considered in any way whatsoever when his application for admission to the University was being considered. All of the other officials of the University testified to sub-

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stantially the same thing. One member of the Board of Trustees was not used, in addition to a few members who were not called because of ill health.

The effect of this additional testimony heard during the trial on the final merits strengthens the former finding of the Court that the Plaintiff was not denied admission because of his race, rather than weakens it.

The proof shows on this trial, and I find as a fact, that there is no custom or policy now, nor was there any at the time Plaintiff's application was rejected, which excluded qualified Negroes from entering the University. The proof shows, and I find as a fact, that the University is not a racially segregated institution. Prior to the decision in the case of Brown, et al v. Board of Education of Topeka, et al, 347 U. S. 483, there was such a custom which was required by the statutes of the State of Mississippi and the Court takes judicial notice of that custom as outlined by the statutes prior to the trial of the Brown case. This custom or doctrine had been approved by the doctrine of the Supreme Court of the United States in the case of Plessy v. Ferguson, 163 U. S. 537. Prior to the Brown decision this was a legitimate and lawful custom and it was within the province of the Legislature to pass those Acts. The proof in the instant case on this hearing fails to show that the application of any Negro or Chinaman or anyone of any other race has been rejected because of his race or color. Under the proof in this case judicial notice, while considered, and properly so, is not enough to meet the burden of proof cast upon Plaintiff to show that he was denied admission because of his race. Judicial notice of facts is not conclusive on factual matters, but is considered along with all the other evidence in the case. Shopleigh v. Mier, 299

U. S. 468; Words & Phrases, Permanent Edition, Vol. 23, p. 294, and the 1961 pocket part.

The Court takes judicial notice of Sec. 4065.3 of the Mississippi Code of 1942 as amended. This was passed in 1956 and the Act requires the officers to use any lawful, peaceable or constitutional means to prevent the implementation of or the compliance with the integration decisions of the Supreme Court of the United States. The Legislature in passing that Act had in mind to use every legitimate means to prevail upon the Supreme Court of the United States to return to the doctrine of Plessy v. Ferguson, but nowhere are any of the officers required to disobey the decisions of the Supreme Court of the United States. There is nothing in the Act that obligates or casts a burden upon any official to disobey or disregard the decisions of the Supreme Court of the United States or to use any unlawful methods to prevent compliance. All the proof in this case, considered in the light of the opinion of the Court of Appeals affirming the judgment of this Court and denying the preliminary injunction, but holding that it was improper to consider the failure to furnish certificates from the alumni of the University, demonstrates clearly that the Plaintiff was not denied admission because of his race. I have weighed the testimony carefully in the light of the decision of the Court of Appeals and have rejected, in weighing it, the evidence to the effect that he had failed to furnish certificates of the alumni, and have taken judicial notice of the statutes affecting the custom of segregation, and am of the opinion, and find as a fact, that he was not denied admission because of his race. It is rather difficult to determine the weight to be given to judicial notice of facts as differentiated from judicial notice of laws, but giving full consideration to the judicial notice that the policy prior to the decision in the Brown case was to segregate the races, and considering that policy along with all the evidence in this case as of 1961 and 1962, I conclude that the evidence is insufficient to hold that that policy is now in effect.

The burden of proof was upon the Plaintiff to prove by a preponderance of the evidence that there was a policy at the time of his application of denying entry to the University of Mississippi because of race, and to prove by a preponderance of the evidence that such policy was applied to the Plaintiff in order to produce discrimination. The plaintiff failed entirely to meet that burden, but on the contrary the evidence shows rather conclusively that he was not denied admission because of his race. In the trial on the merits every witness called by the Plaintiff testified that the race of the Plaintiff was not discussed or considered at all in passing on his application for admission. Each member of the Board of Trustees who was called testified that the question of race was not at any time discussed with any other member of the Board of Trustees concerning the admission of applicants to the University of Mississippi. It is a well accepted rule of law that sworn positive testimony, unless so unreasonable as to be unbelievable, or unless denied by sworn testimony, is to be accepted as true.

Since all of the evidence and all of the exhibits that were introduced into evidence on the trial of the motion for preliminary injunction is now before this Court upon this trial on the merits, I adopt the finding of fact that was made in my opinion of December 12, 1961 as my finding of fact herein, and in addition thereto I find as a fact from all of the additional evidence that was offered on this trial, when considered with all of the evidence offered on the former trial that the Plaintiff was not denied admission because of his race and that the evidence taken in its entirety shows clearly that there was no denial of admission because of his race or color. In adopting the finding of fact which I made in my opinion of December 12, 1961, I am making the same finding after having disregarded those features of it that were eliminated by the Court of Appeals in its decision affirming my judgment.

The Registrar, on cross examination by attorney for Plaintiff, testified that if the application filed by the Plaintiff for admission were considered as still a pending application for admission that he would not accept the application of the Plaintiff, but that his rejection of the application for admission would be based not in the slightest on his race, but that the same rule would be applied if the applicant had been a white person; that the race of the Plaintiff did not enter into his judgment. The Registrar gave as his reason for this statement that credible evidence had been furnished to him since Plaintiff's applications had been presented and rejected that Plaintiff was a rather unstable person; was depressed at times and of a highly nervous temperament; that the Plaintiff had sworn falsely before the Circuit Clerk of Hinds County in making application to register as a voter, swearing that he was a citizen of Hinds County when, as a matter of fact he knew he was a citizen of Attala County, Mississippi and that through this false affidavit Plaintiff had procured himself to be registered as a voter by the Circuit Clerk of Hinds County, Mississippi; that Plaintiff had filed five certificates by citizens of Attala County, certifying that he was of good moral character and recommending him for admission to the University, but that subsequent investigation showed that in procuring these certificates Plaintiff made false representations to the signers as to the purpose for which he intended to use them, stating to two of the signers in substance that he was without a job and needed these statements to help him get a job.

Some of this evidence was objected to, but was tentatively received in evidence. Since the main question before me is whether the Registrar, an administrative officer of the State of Mississippi, had acted in good faith in his rejection of Plaintiff's application for reasons other than race and since these facts were not shown to the Registrar at the time the application was rejected, I have concluded that this testimony should not be considered and have not considered it in reaching my conclusions.

There is one other question of law which was raised prior to the beginning of the trial on the merits that should be commented upon. A motion was filed by the Defendants for the organization of a three-judge court to pass upon the constitutionality of the requirement of the Board of Trustees of State Institutions of Higher Learning that every application for admission to any state institution must be accompanied by recommendations of five alumni. I did not pass upon this question in considering the application for a temporary injunction because of the universal rule that constitutional questions will not be considered if a decision can be reached on non-constitutional questions. In that decision I denied the application for temporary injunction solely on the finding of fact that Plaintiff's application had not been rejected because of his race.

Under the laws of Mississippi this Board of Trustees is a constitutional body and its duties are fixed by Articles V, et seq, Title 24, Vol. 5, Recompiled, of the Mississippi Code, being set forth in Section 6724 and the following sections of that chapter. The Registrar in acting on Plaintiff's application was engaged in the enforecement of an order made by an administrative Board acting under the statutes of Mississippi, but I overruled the motion, declining to request that a three-judge court be convened because the Court of Appeals had, in its opinion, declared these requirements of Mississippi law unconstitutional.

Inasmuch as Plaintiff has failed to meet the burden by showing by a preponderance of the evidence that he was denied admission to the University of Mississippi solely because of his race, the complaint must be dismissed. The Plaintiff undertook to bring the action as a class, acting under Rule 23(a)(3) of the Federal Rules of Civil Procedure, but since Plaintiff failed to maintain this action in his own behalf, he cannot maintain it as a Class Action.

This the 3rd day of February, 1962.

/s/ S. C. MIZE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of
himself and others similarly situated .... Appellant
versus
CHARLES DICKSON FAIR, President of
the Board of Trustees of the State Institutions
of Higher Learning, Et Al. .... Appellees

Appeal from the United States District Court for the Southern District of Mississippi.

ON MOTION FOR INJUNCTION PENDING APPEAL.

(February 12th, 1962)

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

PER CURIAM: Pursuant to the provisions of Title 28 U. S. Code, Sec. 1651[1] and Rule 62 (g), F. R. C. P.,[2] the appellant moves the Court for an injunction during the pendency of this appeal, enjoining the appellees from refusing to admit appellant to the Liberal Arts College of the University of Mississippi for the semester which commenced February 6, 1962, and as to which admissions can be received no later than February 15, 1962, on the ground that such injunction is necessary in aid of this Court's jurisdiction of this appeal which, according to appellant, would otherwise be defeated through mootness of this appeal.

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[1] Writs—(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, §90, 63 Stat. 102."

[2] "Rule 62 (g) Power of Appellate Court Not Limited. The provisions of this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. As amended Dec. 29, 1948, eff. Oct. 20, 1949."

The district court's judgment was entered on February 5, 1962, and the testimony taken before the district court is not yet available to this Court. Hearing on the motion for injunction pending appeal was had before this Court on Saturday, February 10, 1962.

The ground upon which appellant claims that this appeal will become moot before it can be heard and decided in normal course is that, prior to such time, the appellant will graduate from Jackson State College, and will then lose any right to be admitted to the Liberal Arts College of the University of Mississippi. The appellees point out that it is within the appellant's power to avoid that result by his non-attendance on Jackson State College for one quarter of a school year.[3] The appellees insist, and assure this Court, that such non-attendance would not prejudice the appellant's claim to a right to be admitted to the Liberal Arts College of the University of Mississippi.

While we appreciate the hardship which such non-attendance may impose on the appellant, when that hardship is balanced against other possible irreparable damages which might be suffered by the appellant himself and by the appellees from the issuance of the mandatory injunction prayed in the event that the judgment of the district court should ultimately be affirmed, such hardship is not sufficient to permit us to issue the mandatory injunction prayed without an opportunity to study the full record and testimony on the hearing before the district court. At this time we express no views on the merits of this appeal.

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[3] It seems to us, also, that the appeal would not be mooted if appellant did not in fact graduate from Jackson State College because of being permitted to choose subjects of study other than those leading to his graduation.

By expediting the hearing of this appeal, it can be decided on its merits before the beginning of the next college term. The Clerk of this Court and the parties are therefore directed to take all necessary and proper steps to expedite the hearing of this appeal on its merits, and the motion for injunction pending appeal is denied. The Clerk is directed to issue the mandate forthwith.

TUTTLE, Chief Judge, I respectfully dissent.

I think the record already submitted, without the benefit of the record in the trial on the merits, calls for our granting the injunction pending appeal.

Undisputed facts, of which we have already taken cognizance when this case was here on appeal from denial of an interlocutory injunction show that the appellant was denied admission on the stated grounds: (1) that he had failed to furnish recommendations from six alumni of the University; (2) that the University policy (adopted after Meredith originally applied for transfer) prevented a transfer from an unaccredited institution (Jackson State College was at that time unaccredited); (3) the letter then stated: "I see no need for mentioning any other deficiencies."

In view of our holding in the earlier opinion that "We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges," and our holding that the requirement of alumni recommendations was unconstitutional as to Negro applicants and in view of the failure of the defendants to assign any other reason for rejecting appellant's application for transfer, I am convinced that there is sufficient likelihood that this Court will reverse the trial court's findings that Meredith was not denied admission on racial grounds that I would grant the injunction pending appeal.

Jackson State College is now fully accredited, and there is thus now no bar to appellant's transfer on that ground. Nor is there any evidence, even on the trial on the merits, that Meredith would necessarily lose any credits which he has already earned at Jackson State College.

If Meredith continues as a student at Jackson State College, which he must do in order to continue to be entitled to his G. I. educational benefits for himself and his family, he will graduate in June of this year and he cannot thereafter enter the University of Mississippi as a candidate for a bachelor's degree. I do not believe that he should be required to leave college at the beginning of his final term to prevent his appeal from becoming moot. Unless he is admitted to the University by February 15, just three days hence, he cannot transfer until the next term. Therefore, if he is denied the injunction and does not quit school for a term (to keep from graduating) he will be forever denied the right to enter his state university as a candidate for an undergraduate degree, which right I think this Court may well ultimately decide he is entitled to.

I do not think this Court ought to concern itself with any possible damage to the appellant by granting his motion for injunction. He does not need for us to help him decide whether he really wants what he is here fighting so hard to get.

I therefore respectfully dissent.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself
and others similarly situated Appellant

vs.

CHARLES DICKSON FAIR, President of
the Board of Trustees of the State Institutions
of Higher Learning, et al. Appellees

ORDER

This Court having considered the motion by the appellant for the issuance of an injunction in aid of this Court's jurisdiction upon the instant appeal;

And it appearing from said motion that a criminal proceeding has been commenced in the Justice of the Peace Court for Hinds County, Mississippi, Justice District No. 5, on the general affidavit of Paul G. Alexander, Attorney for Hinds County, sworn to and subscribed before Homer Edgeworth, a Justice of the Peace for Hinds County, on the 28th day of May 1962;

And it appearing from the representations of appellant's counsel to this Court that a warrant was duly issued upon said affidavit for the arrest of the appellant and that the appellant was in fact arrested on the 6th day of June 1962;

And it appearing that the said warrant is returnable before said Justice of the Peace on the 13th day of June 1962;

And it further appearing that there is insufficient time to give notice of the filing of appellant's motion and to have a hearing thereon before the return day;

And it further appearing from appellant's motion that the affidavit of Paul G. Alexander alleges that the appellant knowingly procured his registration as a qualified elector of Hinds County, Mississippi, when he did not in fact reside in Hinds County, Mississippi, but was a resident of Attala County, Mississippi, in violation of Section 3218 of the Mississippi Code, 1942, Annotated;

And it further appearing that the question whether appellant knowingly secured his registration as a qualified elector of Hinds County when he did not in fact reside in Hinds County buf was a residnet of Attala County is one of the questions to be decided by this Court upon the instant appeal;

And it further appearing that the issuance of an injunction is necessary in aid of this Court's appellate jurisdiction, it is:

Ordered, Adjudged and Decreed that Paul G. Alexander, his agents, employees, successors and all persons in active concert and participation with him and all persons who shall receive notice of the issuance of this order be, and they hereby are, restrained and enjoined from proceeding with the criminal action instituted against this appellant by the affidavit of Paul G. Alexander in the Justice of the Peace Court of Hinds County, Justice District No. 5, or any other court of the State of Mississippi, charging that appellant knowingly secured his registration as a voter in Hinds County when he did not in fact reside in Hinds County but was a resident of

Attala County, pending this Court's final determination of the instant appeal, brought by the appellant herein.

It is further ORDERED, that a copy of this order and appellant's motion be served upon Paul G. Alexander, County Attorney for Hinds County, and Joseph T. Patterson, Attorney General of the State of Mississippi.

Entered, at New Orleans, Louisiana, this 12th day of June, 1962.

JOHN R. BROWN
United States Circuit Judge

JOHN MINOR WISDOM
United States Circuit Judge

DOZIER A. DE VANE
United States District Judge

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself
and others similarly situated Appellant

versus

CHARLES DICKSON FAIR, President of the
Board of Trustees of the State Institutions
of Higher Learning, Et Al. Appellees

Appeal from the United States District Court for the Southern District of Mississippi.

(June 25, 1962)

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

WISDOM, Circuit Judge: The Meredith matter is before us again. This time the appeal is from a final judgment after a trial on the merits. The judgment denies James A. Meredith, a Mississippi negro in search of an education, an injunction to secure his admission to the University of Mississippi. We reverse with directions that the injunction issue.

A full review of the record leads the Court inescapably to the conclusion that from the moment the defendants discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to discourage and to defeat by evasive tactics which would have been a credit to Quintus Fabius Maximus.

After the trial on the merits, the district judge found "as a fact, that the University is not a racially segregated institution." He found that the state has no policy of segregation. He did find that segregation was the custom *before Brown v. Board of Education* was decided in May 1954. But, he held, "there is no custom or policy now, nor was there any at the time of the plaintiff's application, which excluded Negroes from entering the University." This about-face in policy, news of which may startle some people in Mississippi, could have been accomplished only by telepathic communication among the University's administrators, the Board of Trustees of State Institutions of Higher Learning. As the trial judge pointed out in his opinion, "nearly every member of the Board of Trustees, testified unequivocally and definitely that at no time had the question of race of a party ever been discussed at a meeting of the Board of Trustees or at any other place and that so far as the Board of Trustees was concerned, all policies and regulations were adopted and followed without regard to race, creed or color."

In our previous opinion in this case, 298 F. 2d 696, on the appeal from a denial of the preliminary injunction, it seemed to us that "what everybody knows the court must know."[1] We took "judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges.'"[2] (We find nothing now in this case reaching the dignity of proof to make us think we were wrong to take judicial notice of Mississippi's policy of segregation.) Nevertheless, on that appeal, giving the University the benefit of the doubt, it seemed to us that a trial on the merits would be in the interest of justice: for reasons not attributable to the endeavors or competency of counsel, it was impossible to determine from the record whether there were valid, non-discriminatory grounds for the University's refusing Meredith's admission.[3]

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[1] Justice Harlan in Jacobson v. Massachusetts, 1905, 197 U. S. 11, 30, 25 S. Ct. 358, 49 L. Ed. 643.

The district judge found no reason in the trial on the merits to change his earlier findings of fact and conclusions of law. He held that the evidence "shows clearly that there was no denial of admission because of his race and color." In reaching this conclusion the trial judge adopted the findings of fact in his earlier opinion on the motion for a preliminary injunction. It is necessary therefore to review the case from the beginning. Such whole-case review has the advantage of enabling the Court to consider the various contentions in context and to determine whether the pieces fit together to make a pattern of unlawful discrimination.

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[2] In our previous opinion, on the appeal from a judgment denying a preliminary injunction, we said:

> "This case was tried below and argued here in the eerie atmosphere of never-never land. Counsel for appellees argue that there is no state policy of maintaining segregated institutions of higher learning and that the court can take no judicial notice of this plain fact known to everyone. The appellees' chief counsel insists, for example, that appellant's counsel should have examined the genealogical records of all the students and alumni of the University and should have offered these records in evidence in order to prove the University's alleged policy of restricting admissions to white students. ¶ We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges. Cf. United States v. Harpole, 5 Cir., 1959, 263 F. 2d 71, cert. denied, 361 U. S. 850."

See also footnote 7.

[3] We observed;

> "[T]he transcript and the deposition taken in the presence of the trial judge show that the counsel for the defendants was allowed so much latitude while at the same time the counsel for the plaintiff was so severely circumscribed in the examination of witnesses, introduction of evidence, and argument that the record contains a welter of irrelevancies and, at the same time, a conspicuous omission of evidence that should be helpful to a proper determination of the case."

I.

James H. Meredith was born in 1933 near Kosciusko, in Attala County, one of the rural counties in Mississippi. After graduating from high school in 1950 he volunteered for service in the United States Air Forces. When his hitch was over he reenlisted. In the Air Forces he rose to the rank of staff sergeant. He was discharged in the summer of 1960. He was never in trouble with civilian or military authorities. Meredith received an honorable discharge and the Good Conduct Medal.

Meredith got his education the hard way. Some time in 1953 he decided to improve himself. He turned first to "Fundamentals of Speech" and "Composition and Literature," extension courses of the University of Kansas. In 1954 he enrolled in a course in "Government of the United States" at Washburn University in Topeka. He received the grade of "C" in each of these subjects. From 1954 to 1960 he took advantage of college level courses of the United States Armed Forces Institute, for which Jackson State College credited him with 57 quarter hours credit.[4] Meredith's most fruitful years, educationally, were the two years he spent in Japan just before leaving the service. He attended the Far East Division of the University of Maryland. He tackled difficult courses, such as "Russian," and he carried a heavy schedule. In 1958-1959 he had 5 "B's"; in 1959-1960 he had 3 "B's", 3 "A's", and 1 "F". The University of Maryland credited him with thirty-four semester hours for twelve courses.

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[4] Jackson State uses the quarter hour system for credits. Three quarter hours are roughly equivalent to two semester hours.

Promptly after returning home, Meredith registered at Jackson State College, a "Negro" college in Hinds County, Mississippi. He moved to Jackson with his wife and child. At Jackson State his grades were almost all "A's" and "B's". In January 1961 he applied for admission to the University of Mississippi. When asked on the witness stand why he wished to transfer, he said Jackson State was "sub-standard."

These facts raise a doubt as to the defendants' good faith in asserting that Meredith was not in good faith in applying for admission to the University of Mississippi. That Meredith's transfer would mean the loss of credits and possibly the loss of some G. I. benefits, that he was in his late twenties, that he might find the University of Mississippi considerably more difficult than Jackson State College, demonstrate his perseverance and fit in with the character of a man who is having a hard time getting a college education but is willing to pay the price exacted of a Negro for admission to the University of Mississippi.

II.

The defendants' Fabian policy of planned discouragement and discrimination by delay is evident from the correspondence between Meredith and the University.

Some time in January 1961 Meredith wrote the Registrar for application forms. He received a prompt reply thanking him for his interest and enclosing the forms. January 31 he wrote the Registrar, enclosing the executed forms. In this letter Meredith expressly informed the University that he was a Negro. This was not a gesture of defiance—the forms require a photograph and an indication of race—but a predicate for pointing out that although he could not furnish the names of alumni who reside in his county and have known him for at least two years he was submitting certificates regarding his moral character from Negro citizens who had known him in the county of his birthplace. As is apparent from the letter,[5] Meredith was "hopeful that the com-

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[5] The letter reads:

> "Dear Mr. Robert B. Ellis:
>
> I am very pleased with your letter that accompanied the application forms you recently sent to me. I sincerely hope that your attitude toward me as a potential member of your student body reflects the attitude of the school, and that it will not change upon learning that I am not a White applicant.
>
> I am an American-Mississippi-Negro citizen. With all of the occurring events regarding changes in our old educational system taking place in our country in this new age, I feel certain that this application does not come as a surprise to you. I certainly hope that this matter will be handled in a manner that will be complimentary to the University and to the State of Mississippi. Of course, I am the one that will, no doubt, suffer the greatest consequences of this event, therefore, I am very hopeful that the complications will be as few as possible.
>
> I will not be able to furnish you with the names of six University Alumni because I am a Negro and all graduates of the school are White. Further, I do not know any graduate personally. However, as a substitute for this requirement, I am submitting certificates regarding my moral character from Negro citizens of my State.
>
> Except for the requirement mentioned above, my application is complete. All colleges previously attended have been contacted and my transcripts should already be in your office or on the way. I am requesting that immediate action be taken on my application and that I be notified of its status, as registration begins on

plications [would] be as few as possible." We read this letter as showing no chip on the shoulder and no evidence of such abnormal concern as to support the defendants' contention that from the start Meredith's letters indicate he was "belligerent," a "trouble-maker," and had psychological problems. We think it not unreasonable for a Negro to have some concern over his reception on the "Ole Miss" campus.

February 4, 1961, two days before registration began for the second semester, the Registrar telegraphed Meredith:

> "For your information and guidance it has been found necessary to discontinue consideration of all applications for admission or registration for the second semester which were received after January 25, 1961. Your application was received subsequent to such date and thus we must advise you not to appear for registration."

In his holding on the preliminary injunction, the trial judge found as a fact that this first refusal of admissions was a proper refusal because of "overcrowded condition."[6] In February 1961, however, there were only 2500 to 2600 male students on the campus. As of September

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February 6th, 1961, and I am hoping to enroll at this time.
Thank you very much.

Very hopefully yours,
/s/ J H Meredith

J H MEREDITH
Applicant"

[6] The Registrar sent telegrams to some thirteen or fourteen applicants. He testified that probably as many as 50 to 100 students were not permitted to submit applications. The Registrar also testified that the cutoff was not a sudden decision but was the culmination of a review toward establishing cutoff dates to improve the quality of student personnel.

1961, as the Director of Student Personnel testified, there were about 3000 male students on the campus.

February 20 Meredith wrote the Registrar requesting that his application be treated as a continuing application for admission during the summer session. He called attention to his transcripts having been forwarded from the universities he attended. He concluded, "Again, I would like to express my gratitude for the respectable and humane manner in which you are handling this matter and I am very hopeful that this procedure will continue." The next day his room deposit of ten dollars was returned.

February 23 Meredith returned the ten dollars, explaining that he had requested his application be considered for the summer session. After waiting a month for an answer Meredith wrote the Registrar again. This time he requested that his application be considered as a continuing one for the summer session and for the fall session. He inquired whether his transcripts had been received and whether there were "any further prerequisites to admission." After waiting eight days for an answer, and apparently thoroughly alarmed by eloquent silence from the University, Meredith again wrote the Registrar. It is the letter of a man of perseverance, but a man of patience and politeness. He asked the Registrar to please let him have the University's evaluation of his credits acceptable to the University "if it [were] appropriate at [that] time." He enclosed five certificates certifying to his good moral character and recommending him for admission to the University; the earlier letters were silent on the subject of recommending him. He said that he "realize[d] that [he was] not a usual applicant to the

University of Mississippi, and that some timely items might need to be considered."

Another month went by. Still no answer. April 12 Meredith wrote the Dean of the College of Liberal Arts at the University. In laconic style, barren of comment, Meredith told of his application and his unanswered letters. He concluded:

> "When I forwarded my application to Mr. Ellis on January 31, 1961, I stated in a letter to him and in my application that I am a Negro citizen of Mississippi. Because of my failure to hear from Mr. Ellis since his telegram to me of February 4, 1961, I have concluded that Mr. Ellis has failed to act upon my application solely because of my race and color, especially since I have attempted to comply with all of the admission requirements and have not been advised of any deficiencies with respect to same. ¶ I am, therefore, requesting you to review my case with the Registrar and advise me what admission requirements, if any, I have failed to meet, and to give me some assurance that my race and color are not the basis for my failure to gain admission to the University."

The Dean did not reply to this letter. Belatedly, May 9, the Registrar replied, advising Meredith that "the maximum credit which could be allowed is forty-eight semester hours [for the 90 hours submitted] if your application for admission as a transfer student should be approved." The letter asked Meredith to "please advise if you desire your application to be treated as a pending application."

Meredith took this as a good omen. May 15 he wrote that he wished to attend the first term of the session starting in June, and that it was imperative he be informed with respect to his admission because he would have to make arrangements for his family. He enclosed a letter to the Director of Men's Housing, applying for an apartment appropriate for his family size—a wife and small child. Not having received an answer by May 21, Meredith wrote again. He said that since the Registrar had asked if his application should be considered as pending, he had "assumed by the nature of [the] request that [his] application was entirely complete and that [he had] met all of the pre-registration requirements."

The axe fell May 25, 1961. On that date the Registrar closed his correspondence file on the application and returned the money Meredith had deposited. He gave the following reasons for returning admission:

> "The University cannot recognize the transfer of credits from the institution which you are now attending since it is not a member of the Southern Association of Colleges and Secondary Schools. Our policy permits the transfer of credits only from member institutions of regional associations. Furthermore, students may not be accepted by the University from those institutions whose programs are not recognized. ¶ As I am sure you realize, your application does not meet other requirements for admission. Your letters of recommendation are not sufficient for either a resident or a nonresident applicant. I see no need for mentioning any other deficiencies."

We pause in narrating the facts to observe that the explanation is inadequate on its face. (1) It ignores the credits from Washburn, Kansas, and Maryland. (2) The

"programs" from those institutions are of course "recognized." by Mississippi. As for Jackson State, its program was established and is supervised by the identical Board of Trustees supervising the program at the University of Mississippi. (3) The letters of recommendation refer to the requirement of alumni certificates, a patently discriminatory device.

Up to this point the University had successfully avoided decisive action on the 1961 Fall term. And, because of the lateness of the hour, the University was in a favorable position to resist the expected assaults on the summer sessions.

III.

May 31, 1961, Meredith filed a complaint in the United States District Court for the Southern District of Mississippi. The defendants were the Board of Trustees of the State Institutions of Higher Learning, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University. The Governor of Mississippi appoints the Board with the consent of the state senate. The Board, a constitutional body, is vested with the management and control of all colleges and universities, including the Negro colleges.

The complaint is filed as a class action. It alleges that the defendants are pursuing a state policy, state practice, state custom, and state usage of maintaining and operating separate state institutions of higher learning for the white and Negro citizens of Mississippi; that under this policy Meredith was denied admission to the University solely because of race and color. At the first hearing the plaintiff was denied permission to introduce evidence relating to other colleges and universities in

Mississippi. (In view of the theory of the complaint that segregation was a state policy being carried out by the Board charged with administering all of the state's institutions of higher learning, this ruling was clearly erroneous.) The evidence, therefore, relates only to the University.

At the time the complaint was filed counsel for Meredith sought a restraining order; the summer term was about to begin. The trial judge denied the order.

The case was set for a hearing on the plaintiff's motion for a preliminary injunction, June 12, 1961. This was four days *after* commencement of the summer session. About 3:30 p.m. on the afternoon of the hearing the trial judge stopped the trial and continued the case on the ground that because of his crowded docket he had set aside only one day to hear the case. The case was continued until July 10, 1961, at which time, according to the court, the entire case would be heard since, in the interim, the answer would be filed, the issues "definitely framed and we can begin the case and finish it." In practice, in almost all cases, a hearing on a motion for a preliminary injunction is held before an answer is filed.

The case was not heard on July 10 because of a scheduled three-judge court case which required the presence of the trial judge below and involved counsel for both parties. Meredith's counsel therefore filed, June 29, another motion for a preliminary injunction, since the second summer term would commence July 17. The motion was fixed for a hearing on July 11. On July 10 the chief counsel for the defendants, Assistant Attorney General Shands, was ill. His illness caused the case to be continued to August 10, 1961. By that time any possibility of attending the second summer session had gone winging.

June 9 and 30, 1961, and again July 27, July 28, and August 4, 1961 Meredith's counsel sought to take the Registrar's deposition. The efforts were singularly unsuccessful. The trial judge denied the first motion on the ground that the deposition could not be taken prior to the expiration of twenty days from the filing of the complaint. See Fed. R. Civ. Proc. 26. The second notice of taking was suspended and stayed by the court on the ground of Mr. Shand's poor health, June 27, two weeks before the July 10 postponement of the trial. August 1 the trial judge vacated the other three notices on the ground that the court was "in the process of trial on plaintiff's motion for Temporary Injunction, and the exercise of [the] court's discretion." This appears to us to have been a clear abuse of judicial discretion.

Counsel for Meredith filed a motion that the University produce records of all students admitted to the February 1961 term, the 1961 summer terms, and the September 1961 term for inspection July 1 to July 7. The motion, filed June 20, was not heard until July 27, because of Mr. Shands' ill health and because of the crowded court calendar. August 1 the district court ordered the records produced for inspection, but limited inspection of records to applications for undergraduate enrollment in the 1961 summer terms, and to the applications to the graduate schools. This order was manifestly erroneous and was one of the causes for the poor state of the record in the hearing for the preliminary injunction.

July 10 the trial judge announced that the hearing on August 10 would be a trial on the merits. August 1 this ruling was reversed; the trial judge ruled that the August 10 hearing would be a continuation of the June 12 hearing on the preliminary injunction.

July 19 the defendants filed their answer. The answer supplemented the Registrar's letter of May 25 by giving a large number of additional reasons, many of them trivial, for the University's having refused Meredith admission. The answer emphasizes the following reasons. (1) Meredith failed or refused to submit the requisite alumni certificates. (2) Meredith "was not seeking admission to the University of Mississippi in good faith for the purpose of securing an education," considering all of the circumstances and particularly the fact that as a consequence of transferring to the University he would lose credits and G.I. benefits. (3) Merdeith's fear that his application might be denied because of his race "shocked, surprised and disappointed" the Registrar. It was so "rash" and "unjustified" that it raised grave questions as to Meredith's "ability to conduct himself as a normal person and a harmonious student on the campus of the University of Mississippi." The Registrar, for himself and the other defendants, all of whom adopted his answer, denied that "he understands and interprets the policy of the State of Mississippi as being that negroes and whites are educated in separate institutions of higher learning."[7]

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[7] Mississippi's strong policy in favor of segregation is reflected in its statutes. Mississippi, in addition to enacting a resolution of interposition, enacted a statute requiring all members of the executive branch of the state government to prevent implementation of Brown v. Board of Education and enforce segregation in the public schools and other public facilities "by any lawful, peaceful and constitutional means" (Miss. Code, 1942 § 4065.3). There is no statute limiting admissions to the University of Mississippi but Mississippi State College is limited to white males (Miss. Code, 1942, § 6694); Alcorn Agricultural and Mechanical College was established in 1878 for the education of the colored youth (Miss. Code, 1942, § 6703); Mississippi

August 10 the hearing on the motion for a preliminary injunction which commenced and was adjourned June 12 was resumed. But on August 11, it was recessed again. Mr. Shands had to appear in another court August 14 on motions he had filed in another suit. The hearing resumed August 15 and concluded August 16.

At the end of this hearing, the trial judge gave the defendants until September 5 to file their brief, and the plaintiff ten days thereafter to file a reply brief.

The last date to register for the fall semester was September 28. The trial judge did not decide the case until December 12. He entered an order in favor of the defendants December 14, 1961. That shot the first semes-

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State College for Women is also limited to white students (Miss. Code, 1942, §§ 6711 and 6714); Jackson State College for Negro Teachers, now known as Jackson State College, is the institution of higher learning which appellant now attends (Miss. Code, 1942, §§ 6808-01, 6809). The Board of Trustees has statutory authority to provide graduate and professional instruction for Negro youth outside the State "when such instruction is not available for them in the regularly supported institutions of higher learning" (Miss. Code, 1942, § 6726.5). Moreover, in 1959 the State Sovereignty Commission of Mississippi issued a report on the state's Negro and white schools, teachers and colleges. This report states the following:

> The 1958-1959 allocation of state appropriated funds for Senior Colleges broken down on the basis of the amount allocated per student, is as follows:

1. Alcorn A. & M. College — (Negro)	$747.65
2. Mississippi Vocational — (Negro)	725.09
3. University of Mississippi — (White)	675.69
4. Delta State College — (White)	652.54
5. Miss. State College for Women — (White)	552.53
6. Jackson State College — (Negro)	476.47
7. Mississippi State University — (White)	454.67
8. Mississippi Southern College — (White)	387.10

Race Relations Law Reporter 467 (1959). There is a state constitutional provision and several state statutes requiring segregation in the public schools. E.G., Miss. Constitution, 1956, Art. 8, § 207; Miss. Code, 1942, § 6220.5, 6328.03.

It is common knowledge that the white universities listed above will not engage in any athletic contest with any university having Negro players on its team. In 1961 Mississippi State Basketball Champions of the Southeastern Conference, declined an invitation to play in the N.C.A.A. tournament for the national championship.

ter of 1961-1962. The commencement of the second semester was not far off—February 6. Immediately following entry of the order, Meredith's counsel filed a notice of appeal and moved this Court for an order advancing the appeal. This Court heard the appeal January 9 and rendered its decision January 12. We affirmed the district court's denial of the motion for a preliminary injunction. We suggested that the district court proceed promptly with a full trial on the merits.

In that decision we disposed of one of the reasons the University stressed in rejecting Meredith—the requirement that he furnish alumni certificates. We held that such a requirement is a denial of equal protection of the laws in its application to Negro candidates for admission. Again we pause, this time to say that if there is any question as to the scope of that ruling, we now hold that the requirement of recommendations, whether from alumni or from citizens generally, attesting to an applicant's good moral character or recommending an applicant for admission, is unconstitutional when, as this case demonstrates, the burden falls more heavily on the Negroes than on whites. This is not to say, of course, that good moral character is not a reasonable test for admission.

We held that on "the muddy record" before us it was "impossible to determine whether there were valid, nondiscriminatory grounds for the University's refusing Meredith's admission." We made certain observations for the guidance of the district judge presiding at the trial.[8] We emphasized that, "*Within proper legal bounds*, the plaintiff should be afforded a fair, unfettered, and unharassed opportunity to prove his case."

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[8] See 298 F. 2d 696, 702.

The trial on the merits set for January 15, 1962, commenced January 16. At 2:00 p.m. on that date it was postponed until 3:00 p.m. January 17, to give the defendants' counsel an opportunity to confer with the defendants. At 3:00 p.m. January 17 the defendants' counsel moved for a continuance on account of Mr. Shands' illness; he was hospitalized. The two special assistants stated to the court that they were not prepared to proceed with the trial. The district court continued the case until 2:00 p.m. January 24, 1962.

Before the trial, the district court quashed that part of a subpoena requiring the Registrar to produce admission records for the February 1961 term; the Registrar was required to produce only records commencing with the first summer term. This holding, seriously handicapping plaintiff's counsel, apparently overlooked our ruling in the earlier opinion: "The limitation of evidence to that pertaining to the summer session of 1961 is clearly erroneous. It is erroneous since the policy and practice of the University in admissions were at issue."

February 5, 1962, the district judge entered an order denying all relief requested and dismissing the complaint. The same day, the plaintiff appealed to this Court and also filed a motion for a preliminary injunction pending appeal on the ground that unless Meredith were admitted to the February 1962 term, the case would become moot. This Court heard the motion February 10. A majority of the Court, Chief Judge Tuttle dissenting, denied the motion February 12. F. 2d . Still anxious to give this case full study on an adequate record, we held that the appeal would not necessarily be moot; that Meredith could avoid the mootness by attending Jackson State College for one quarter of the school year or by being permitted to choose courses not necessarily leading to his graduation. Meredith pursued the latter course.

The net effect of all these delays was that the February 1961 term, the two summer terms of 1961, and the two regular terms of 1961-62 slipped by before the parties litigant actually came to a showdown fight. Some of these delays, as in any litigation, were inevitable. Some are attributable to continuances of doubtful propriety and to unreasonably long delays by the trial judge. We refer, for example, to the delay between the end of the trial, August 16, and the entry of the district court's order, December 14. Many of the delays resulted from the requests of defendants. We do not question Mr. Shands' good faith or the fact of his illness, but the Attorney General's Office is well-staffed.[9] And—there are plenty of lawyers in Mississippi ready, able, and more than willing to represent the University. We draw the inference that not a few of the continuances and the requests for time in which to write briefs were part of the defendants' delaying action designed to defeat the plaintiff by discouragingly high obstacles that would result in the case carrying through his senior year. It almost worked.

As a matter of law, the principle of "deliberate speed" has no application at the college level; time is of the essence. In an action for admission to a graduate or undergraduate school, counsel for all the litigants and trial judges too should be sensitive to the necessity for speedy justice. *Lucy v. Adams*, N.D. Ala., 1955, 134 F. Supp.

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[9] There are nine lawyers on the Attorney General's staff. Of counsel for the defendants in this case, in addition to Mr. Shands, were an Assistant Attorney General and two Special Assistants. The Assistant Attorney General and one of the Special Assistants carried the brunt of the appellate arguments before this Court.

235, aff'd 228 F. 2d 619, cert. den. 351 U. S. 931; see also 350 U. S. 1, and *Hawkins v. Board of Control*, 1956, 350 U. S. 413, S. Ct. ; L. Ed.

IV.

We turn now to the reasons the University gave in its letter of May 25 for rejecting Meredith.

A. Alumni Certificates—Letters of Recommendation

1. One of the most obvious dodges for evading the admission of Negroes to "white" colleges is the requirement that an applicant furnish letters or alumni certificates. The Board established the requirement by resolution, November 18, 1954, just a few months after the Supreme Court decided *Brown v. Board of Education.* We mention it again at this point in the opinion because its adoption and incorporation in current Bulletins (Catalogues) of the University show affirmative action by the Board to evade desegregation. The action unquestionably was part of conscious University and State policy. It was action that must have been preceded by discussion among members of the Board.

The University's continued use of the requirement seems completely unjustifiable in view of decisions denying the use of such certificates at Louisiana State University and at the University of Georgia. Since at least 1958, when *Ludley v. Board of Supervisors, Louisiana State University*, E.D. La., 150 F. Supp., aff'd, 252 F. 2d 372 (*cert. den.*, 358 U. S. 900) was decided, the Board has been on notice that the courts construe such a requirement as an unconstitutional discrimination against Negroes. If the Board had any doubt about it, that doubt should have been resolved in 1959 when a similar requisite of the University of Georgia was held to be unconstitutional.

Hunt v. Arnold, N.D. Ga., 172 F. Supp. 847 (not appealed). We regard the continued insistence on the requirement as demonstrable evidence of a State and University policy of segregation that was applied to Meredith.

2. Although defendants' counsel deny that the alumni certificates were for discriminatory purposes or had discriminatory effects, they assert that the enabling resolution of the Board was an administrative order having the effect of a state statute. For this reason, they say that a three-judge court should have passed on the constitutionality of the certificates. (This position is, of course, inconsistent with the defendants' we-still-say-its scissors denial of any state policy of segregation in Mississippi colleges.) We hold that the Board resolution was an administrative order having an effect similar to a statute, and that it constituted a broad state policy and university policy. We hold, however, that its manifest unconstitutionality makes a three-judge court unnecessary. *Ex Parte Poresky*, 1933, 290 U. S. 30, 54 S. Ct. 3, 78 L. Ed. 152; *Turner v. City of Memphis*, W.D. Tenn., 1961, 199 F. Supp. 585, vacated, U. S. , 82 S. Ct. , 7 L. Ed. 2d 762; *Bailey v. Patterson*, S.D. Miss., 1961, 199 F. Supp. 595, vacated, U. S. , 82, S. Ct. , 7 L. Ed. 2d 512.

3. The evidence also shows that the requirement of alumni certificates was discriminatorily applied to Meredith. The Registrar testified that the files of white transfer students admitted to the 1961 summer session contained letters of recommendation which did not mention good moral character. He explained that such students were permitted to register pending the receipt of all required certificates. No such latitude was extended Meredith.

B. The University's Policy Regarding Transfer Students from Non-Member Colleges of Regional Associations.

February 7, 1961, just six days after the University received Meredith's application, the Board adopted the following resolution:

> "[T]hat all state supported Institutions of Higher Learning may accept transfer students from other state supported Institutions of Higher Learning, private colleges or denominational colleges only when the previous program of the transferring college is acceptable to the receiving Institution, and the program of studies completed by the student, and the quality of the student's work in said transferring college is acceptable to the receiving Institution and to the Board of Trustees."

This resolution stiffens the policy as stated in the University Bulletin, General Catalog, Issue 1960:

> "ADMISSION FOR TRANSFER STUDENTS:
>
> ADVANCE STANDING. Students may be admitted from *other approved institutions* of higher learning upon presentation of official transcripts of credits which certify honorable dismissal and eligibility for immediate readmission." (Emphasis supplied)

The May 25 letter advised Meredith that he was denied admission because "students may not be accepted by the University from the Institutions whose programs are not recognized." Translating, the Registrar said that this means that Meredith could not transfer to the University because Jackson State College was not a member of the Southern Association of Colleges and Secondary Schools.

It also means that the Board, which runs Jackson State too, could set up at Jackson State and other Negro colleges a program inherently incapable of ever being approved.

But this reason is no longer valid. December 16, 1961, Jackson State was admitted to membership in the Association.

The reason was never valid, and again demonstrates a conscious pattern of unlawful discrimination.

Before December 1961, as the Registrar testified, not one of the three Negro colleges was a member of the Association. They were, however, on the Association's *approved* list of Negro Colleges. At the time Meredith applied for admission, the University catalogue, as quoted, provided that transfer students might be accepted from another "approved Institution of Higher Learning." The College Accrediting Commission of the State of Mississippi (Miss. Code, 1942, §6791.5) has approved Jackson State College.

In defending its position the University draws a distinction between "accepting" credits and "recognizing" credits, a distinction that eludes the Court.[10] The defendants' explanation is that "the justification for only recognition was the fact that the appellant could not transfer from Jackson State College." Any reasonable interpretation of the resolution would limit its effect to transfer students with credits only from non-approved or non-accredited colleges. It seems to us indefensible to ignore Meredith's attendance at such accredited universities as Maryland, Kansas, and Washburn on the excuse that his last college was Jackson State.

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[10] Counsel for the defendants, drawing another fine distinction, argue that the University "gave a tentative evaluation of twelve hours to Jackson State College work earned, but that no credit was given for such work." There are more obstacles in sight on the matter of these credits: even though Jackson State is now an accredited member of the Southern Association, the Registrar finds that he does not know whether that membership will have a retroactive effect on credits from Jackson State.

At the trial, plaintiff's counsel inspected 214 files of students denied admission to the Summer Sessions of 1961, the September Session of 1961, and the February Session of 1962. Not one was a student who had credits from both accredited and non-accredited colleges. Thus, Meredith was not in the same category with any other student *denied admission* for lack of credits. There were six instances of students denied transfer from non-accredited schools; these students of course, had no credits to transfer. In five instances the applicant had attended only the one non-accredited school from which he requested transfer. One was in the same academic class as the plaintiff, in the sense that he had attended an accredited school, Bucknell. Unlike Meredith's transcripts, his Bucknell transcript stated: "Permitted to withdraw. Academic status unsatisfactory." At the time of his application he was taking a course in English composition at an unaccredited junior college and a remedial reading class somewhere else. Even so, in spite of his miserable record, the Registrar advised the boy's mother that the University of Mississippi would admit him on probation if he were eligible to return to Bucknell and if he maintained a "D" average. Thus, Meredith was not treated the same as another in the same category but with an inferior record.

In short, the transfer policy was both discriminatorily applied and irrationally construed in order to bar Meredith's admission.

C. Transfer of Credits from Jackson State

May 9, 1961, the Registrar wrote Meredith a letter in which he evaluated Meredith's 90 semester credits at 48 semester-hours. Six days later, just ten days before the axe fell on May 25, the Committee on Admissions adopted a policy of accepting "credits only from institutions which are members of a regional accrediting association or a recognized professional accrediting association."

Jackson State's admission as a member of the Southern Association of Colleges and Secondary Schools removes this policy as a bar to accepting Meredith's credits from that school. At the trial the Registrar testified that the policy operated to preclude acceptance of only the Jackson State credits. It is impossible to understand, therefore, why in the letter of May 25 the Registrar gave as the first reason for turning Meredith down that the "University cannot *recognize* the transfer of credits from [an] institution which . . . is not a member of the Southern Association of Colleges and Secondary Schools." On the Registrar's own evaluation, Meredith had enough credits to be transferred as a sophomore. There is no suggestion in any of the correspondence that Meredith insisted on being transferred as a junior or that the university recognized all his credits.

We draw the inference again that the assigned reason for rejecting Meredith was a trumped-up excuse without any basis except to discriminate.

Thus far, we have covered all of the specific reasons given in the May 25 letter. On the record, as of May 25, 1961, the University had no valid, non-discriminatory grounds for refusing to accept Meredith as a student.

V.

A college registrar is entitled to take advantage of play in the joints in administering an office frequently requiring deliberate ambiguity and conscious confusion in order not to offend the delicate sensibilities of some college student and his parents. We recognize the necessity for such latitude and the sagacity of the final clause in the Registrar's letter of May 25, "I see no need for mentioning any other deficiencies." But the reasonable discretion permissible in an admissions policy cannot be exercised to bring about unlawful discrimination.

We take up now the ex post facto rationalization of the turndown. It may be debatable whether the Court should consider any newly originated reasons and any post — May 25 evidence, but we sit as a court of equity. Consideration of such matters cuts both ways; the plaintiff seeks to take advantage of the new status of Jackson State College. In an analogous situation, in labor cases, evidence of a discriminatory discharge or other unfair labor practice occurring after the filing of the charge upon which the complaint is based may be considered by the National Labor Relations Board and the reviewing court. *N.L.R.B. v. Fant Milling Co.*, 1959, 360 U. S. 301, 79 S. Ct. 1179, 3 L. Ed. 2d 1243.

A. The Alleged False Registration: A Frivolous Defense.

The defendants attempted to show Meredith swore falsely before the Circuit Clerk of Hinds County in making application to register as a voter, swearing that he was a citizen of Hinds County when he knew he was a citizen of Attala County. In his opinion on the merits, the district judge declined to make a finding of fact on this point "since these facts were not known to the Registrar at the time the application was rejected," and "concluded that this testimony should not be considered" in reaching his conclusions. In his opinion on the motion for a preliminary injunction the district court said that the *defendants* "brought out on cross examination that after [Meredith] entered Jackson State . . . he swore fasely that he was a citizen of Hinds County." The district court made no finding on the alleged "false swearing," although it found that Meredith "was and is now a citizen of Attala County, Mississippi."

The complaint alleges that Meredith is a resident of Hinds County. Jackson State College is in Hinds County. Meredith registered to vote in Hinds County. That is where he lived with his wife and child. J. R. McLeod, Deputy Clerk of Hinds County registered Meredith after he received complete and accurate information from Meredith with regard to his residence. He testified that Meredith was properly registered and was "qualified to vote" in Hinds County.

Section 251 of the Mississippi Constitution prohibits registration of an elector in the four months preceding any election at which he offers to vote. But "no person who, in respect to age and residence would become entitled to vote within the said four months, shall be excluded from registration on account of his want of qualification at the time of registration."

Meredith's residence in Hinds County with his wife and child began September 1960. He registered in Hinds County February 2, 1961, which he had a right to do under Section 251 of the state constitution. As McLeod testified, "he had moved into Hinds County in time to have been qualified to have voted in 1961 (sic) since he moved in prior to the general election in 1960 . . . and on that basis I registered him." He said: Meridith "had stayed there past the general election on Tuesday after the first Monday of November which put him past one general election, and then he would have lived there a year before the next ensuing general election which would be Tuesday after the first Monday in November of '61. . . . *Yes, he was qualified to vote in Hinds County.*"

There is no false statement in the registration application Meredith filled out except the date. This he inadvertently wrote "February 2, 1960" when it was in fact February 2, 1961; the Poll Tax Exemption Certificate for Service Men, which McLeod filled out for Meredith at the same time he registered, is properly dated February 2, 1961. Meredith correctly gave September 30, 1960, as the date his residence began in Jackson, in Hinds County. There can be no question therefore of any deception on his part. He stated that his prior place of residence was Kosciusko. It seems clear to us that he was open and straightforward. Meredith testified:

> "I told him [the deputy clerk, McLeod] that I had been in the service [in order to qualify for a Poll Tax Exemption Certificate]. I told him that I had never lived in Hinds County [He had not previously; the application shows the date his residence in Jackson commenced]. I told him that I had always lived in Attala County. [True enough, and necessary as a predicate for the poll tax exemption] . . . I was going to Jackson State College and wanted to register and vote in [Jackson] Hinds County, as the voting place most convenient and closest [to his residence] . . . I explained my

whole situation to the man when I went up to register to vote."

The testimony of the deputy fully supports Meredith's testimony and the correctness of the statements in the sworn affidavit.

There is confusion in some of the testimony. Mr. Shands caused some of the confusion by repeatedly referring to the Poll Tax Exemption Certificate as the registration application. (Meredith had taken this certificate out of his pocket and was holding it in his hands during the examination.) The plaintiff caused some of the confusion by polite "Yes Sir's" to some of Mr. Shand's leading questions, (e.g. "You knew it was untrue.") In the printed record these "Yes Sir's" appear at first glance to be admissions of false statements. Examining the record closer, it is evident that Meredith made no admissions of any false statements; the "Yes Sir's" simply indicate Meredith was attentive and following the questions.

We hold that the contention is frivolous. We have gone into the facts, as with some of the other contentions, only because they show a determined policy of discrimination by harassment.

B. Meredith a Troublemaker

The Registrar, relying on his interpretation of Meredith's character from the correspondence and from the testimony, testified that he would have to deny Meredith's admission *now*. He said, Meredith "would be a very bad influence" at the University: item one; Meredith was "a man who has got a mission in life to correct all of the ills of the world." The defendants rely more importantly on excerpts from admittedly incomplete Air

Force records to support their conclusion that Meredith was "a trouble maker" who has "psychological problems in connection with his race."[11]

Taken out of context, some portions of Meredith's record lend support to the defendants' position. The most damaging bit is a psychiatry report dated April 29, 1960:

> "This is a 26 year old negro S Sgt who complains of tension, nervousness and occasional nervous stomach. Patient is extremely concerned with the 'racial problem' and his symptoms are intensified whenever there is a heightened tempo in the racial problems in the U S and Africa. Patient feels he has a strong need to fight and defy authority and this he does in usually a passive procrastinating way. At times he starts a crusade to get existing rules and regulations changed. He loses his temper at times over minor incidents both at home and elsewhere. No evidence of thinking disorder. ¶Diagnosis: Passive aggressive reaction, chronic, moderate. ¶Recommendations: No treatment recommended. Patient declined any medication."

It is certainly understandable that a sensitive Negro, especially one overseas, might have a nervous stomach over the racial problem. There must be a good many Negroes stateside with similar abdominal reactions. We find it significant that the psychiatrist found "no evidence of a thinking disorder," that he found Meredith's "strong need to fight and defy authority" took a "passive'' form, and that no treatment was recommended. Meredith, incidentally, voluntarily went to the psychiatrist.

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[11] One of the defendants' attorneys happened to be in St. Louis, one of the Air Force Record Centers, on personal business; while there he selected excerpts from Meredith's records. Defendants admit that Meredith cooperated fully in giving them permission to examine his records.

The defendants expressly admit in their brief that Meredith had a good record during his first enlistment. They count on a general deterioration of attitude allegedly demonstrated in his last efficiency report. This report is for the period November 3, 1959 to July 18, 1960 at San Francisco, California, although the reporting official who made out the fitness report had directly supervised Meredith only two months. The reporting official's comments should be compared with the comments in the report dated May 22, 1959[12] It furnishes no basis for down-

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[12] The comments of the reporting official for the report dated 18 July 1960 are:

> "*Facts and Specific Achievements*: During this reporting period, Sgt Meredith took a negative attitude toward most of the jobs assigned him. He ignored the maintenance of NAMAP Form 44, individual training record, even though this form was reviewed with him, and he was specifically assigned this duty. He further failed to maintain an accurate record of items covered at Commander's Call, for future reference. A recommended method of such recording was explained to him, and he was directed to maintain this each month. His maintenance of the squadron duty roster was far below what he is capable of, and he exercised no tact or diplomacy in dealing with persons of equal or higher rank, thus causing much unnecessary friction and ill feeling. He did render much assistance and display his resourcefulness in connection with the recent squadron display for Armed Forces Day.
>
> *Strengths*: Sgt Meredith has taken advantage of many opportunities to further his own education, and has counseled and encouraged many airmen to do likewise. He has a quick mind, capable of clear thinking, and is not content to merely ride with the tide.
>
> *Recommended Improvement Areas*: In the opinion of this writer, the area most needing improvement in Sgt Meredith's case is his outlook on the world in general, and more especially those to whom he owes allegiance, at present the squadron to which he is assigned and the United States Air Force. Further, he should rid himself of his antagonistic attitude, and develop a spirit of cooperation.
>
> *Suggested Assignments*: Sgt Meredith has expressed a desire to leave the Air Force, and has forfeited his op-

grading Meredith as a psychological risk on the campus. The rating official thought that Meredith had a "negative attitude toward most of the jobs assigned him" (he was leaving the service in a couple of months); that Meredith "exercises no tact or diplomacy in dealing with persons of equal or higher rank, thus causing unnecessary friction;" that he needed improvement in his outlook on the world, more allegiance to his squadron and the Air Forces, less of an "antagonistic attitude" and more of a "spirit of cooperation." But he also wrote: "Sgt. Mere-

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> portunity to reenlist. Inasmuch as I feel his intended course of action will be best for both himself and the Air Force, I can make no recommendation for future assignments."

The comments of the reporting official (a different man) for the report dated May 22, 1959 are:

> "*Strengths*: SSgt Meredith is interested and very active in educational activities. He expends a great deal of effort to expand his own education. He is Education NCO for the Squadron. He also supports the Squadron athletic program in his capacity as Athletic NCO.
>
> *Recommended Improvement Areas*: SSgt Meredith is not always tactful in dealing with other people. He allows himself to become upset too easily, and this is a strong contributing factor to his problem of displaying tact. In this situation, he loses his otherwise normally effective expression He is aware of these occasional tendencies, and is making progress to improve in these areas.
>
> *Facts and Specific Achievements*: SSgt Meredith carries out his duties in an effective and satisfactory manner. He volunteered for and is performing the extra duties of Education NCO and Athletic NCO for the Squadron. In his capacity as Education NCO, he takes a genuine interest in the educational problems of the airmen in the Squadron and assists them by advising and counseling them on improving their education. SSgt Meredith is one of the most financially responsible NCO's I have known. He manages his personal affairs in a commendable manner.
>
> *Suggested Assignments*: Based on his background and his keen interest in the education area, SSgt Meredith should be most effective in an assignment where he would have the opportunity to work with base education programs.
>
> *Other Comments*: "This report and all ratings given have been discussed with SSgt Meredith. SSgt Meredith does not supervise DAFC or Japanese National personnel."

dith has taken advantage of many opportunities to further his own education, and has counseled and encouraged many airmen to do likewise. He has a quick mind, [is] capable of clear thinking, and is not content to merely ride with the tide." The rating sergeant checked a blocked form stating: "Sometimes creates friction. Slow to help others;" but he typed out: "He did render much assistance and display his resourcefulness in connection with the recent squadron display for Armed Forces Day." Every other checked block was favorable: "Knows all routine duties with some knowledge of more complex duties; completes most assigned duties satisfactorily; always understands instructions when given in detail; frequently seeks out opportunities to improve himself; succeeds under favorable conditions; usually conserves men, money, and material by implementing and maintaining routine management procedures; and accepts most responsibilities when specifically assigned."

Summarizing "Suggested Assignments," the reporting official, a sergeant, stated: "I feel [Meredith's] intended course of action [leaving the Air Force] will be best both for himself and the Air Force." He did not recommend Meredith for promotion. But Meredith's immediate supervisor, the Adjutant, a lieutenant, and the Unit Commander, a major, disagreed. They recommended Meredith for promotion "along with other airmen of equal service and experience."

One short answer to the defendants' contention is the Good Conduct Medal. Another short answer is that Meredith's record shows just about the type of Negro who might be expected to try to crack the racial barrier at the University of Mississippi: a man with a mission and with a nervous stomach.

C. Bad Character Risk

The defendants are scraping the bottom of the barrel in asserting that the University should not now admit Meredith because he is a bad character risk. They rely on (1) the frivolous charge of false swearing, previously discussed, 2) alleged misrepresentation by Meredith in obtaining letters of recommendation from Negroes who knew him in Attala County before he entered the Service, and (3) certain trivia.

At the trial on the merits defendants' counsel introduced affidavits from four of the five Negroes who had written letters of recommendation for Meredith. These affidavits purport to show that Meredith obtained his letters by misrepresentation. The affidavits were obtained by one of the Assistant Attorneys General of counsel in this case. He testified:

> "The affiants were requested to come to the law office of Mr. John Clark Love, which they did on their voluntariness — they came of their own volition. When they arrived there, they were interviewed in the presence of the Justice of the Peace and in one instance by the Notary who was there present. They were asked various questions as to the good moral character of the plaintiff. They were asked under what conditions had the previous or the first certificates which accompanied the application — under what conditions were they asked. And they replied that he stated that he was attempting to get a job and that was the reason the certificates were asked."

Mr. Love is a man of stature in the community. He is a State Senator and a former member of the State Sovereignty Commission.

There is no evidence of coercion. But the affidavits were drawn by the defendants' attorney and were taken in the presence of persons representing, to a country Negro, the power and prestige of The Establishment of Attala County and the State of Mississippi. The statemnets would have carried more weight had the affiants testified as witnesses in open court protected by the safeguards our system of law extends to witnesses. The defendants give no explanation for failing to call these affiants as witnesses.

None of the affidavits alleges that Meredith is a person of bad moral character. Only two of the four allege that Meredith represented that he needed the certificate to help obtain a job. Each alleges that the affiant did not know the certificate was to be used for admission to the University. Each alleges that the affiant had seen very little of Meredith since he left Kosciusko in 1949; that the affiant could not now certify to his good character nor recommend him for admission to the University of Mississippi.

An unsigned affidavit from the fifth affiant, the plaintiff's cousin, states: "At the time of the signing of this statement [the recommendation] I knew full well and was aware of the purpose for which such certificate was to be executed." This unsigned statement, unlike the executed affidavits, significantly is the only one that contains the following declaration: "I am not now nor have I ever been in any serious trouble or convicted of any crime or misdemeanor."

In sum, we consider it unreasonable to attach any substantial weight to these affidavits. They do not carry enough weight in themselves nor in connection with the evidence as a whole of Meredith's character to justify a reasonable belief that Meredith is a bad moral risk as a University students.

The other asserted "evidences" of bad moral character are trivia. The defendants contend that:

1. Meredith was "adamant [in] refus[ing] to properly get and send to the Registrar certificates from Alumni as to his good moral character"; further, "those certificates which he sent in lieu of the Alumni certificates never were valid certificates as they are absolutely silent as to the position or standing of the certifiers in the community."

2. Meredith admitted that he brought stationery with him from the Air Force. (This refers to a few sheets of surplus stationery. This question as to his honesty led to inquiries as to government property being in his possession and required the production of the serial number of a typewriter purchased after his discharge.)

3. "Appellant was not a good character risk for he refused to list Wayne University in his application to the University, when the application required that the prospective applicant list all universities and colleges attended." (Meredith attended Wayne for two weeks only.)

These are on a par with the defense, asserted in the complaint, that one of the reasons for rejecting the application was that "all letters received by [the Registrar] from plaintiff were sent registered mail return receipt requested.'' Or with the defense, argued even now, that his application is incomplete because "appellant has not seen fit to forward a supplemental transcript from Jackson State." This transcript was introduced into evidence and is in the record. Meredith repeatedly asked the Registrar to advise him whether there was anything further he needed to do to complete his application. The triviality of these and other of the defendants' contentions is a proper consideration for the Court in reviewing the whole case to determine whether the University barred Meredith for good and valid reasons or in fact barred him because he was a Negro.

CONCLUSION

There are cases when discrimination is purposeless but unlawful because of its effect. In this case the essence of the complaint is purposeful discrimination against Negroes as a class. The inquiry into purpose makes it especially appropriate for the Court:

(1) to study the case as a whole, weighing all of the evidence and rational inferences in order to reach a net result;

(2) to consider the immediate facts in the light of the institution's past and present policy on segregation, as reflected not only in the evidence but in statutes and regulations, history and common knowledge;

(3) to measure sincerity of purpose against unreasonable delays and insubstantial reasons asserted for the institution's action;

(4) to compare the actions taken with regard to the plaintiff with actions taken with regard to others in the same category;

(5) to pierce the veil of innocuity when a statute, regulation, or policy necessarily discriminates unlawfully or is applied unlawfully to accomplish discrimination.

The defendants fail the test. There are none so blind as those that will not see.

The defendants' answer asserts and the Registrar testified that the State of Mississippi has no policy of educating Negroes and whites in separate institutions. This is in the teeth of statutes, only a few which need be cited for illustration.[13] It is contrary to official state publications with which every college official in Mississippi must be familiar. It defies history and common knowledge.

Similarly, the defendants assert that there is no policy of excluding Negroes at the University. The district judge found that there was a policy of segregation *before Brown v. Board of Education* was decided in 1954. The trustees and the principal officials of the University testified that *after* 1954 there has been no change in policy with respect to the admission of Negroes. They testified that the admission of Negroes had never been discussed in any meeting of the Board or in any meeting of the administrative staff. In spite of the enormous publicity given to this case by the newspapers, some of which are in evidence, the trustees and other personal defendants said that none of the officials of the University discussed Meredith's application in an official capacity. Even the Registrar had not discussed Meredith's application with anyone except with the Dean of the College of Liberal Arts, who had merely referred Meredith's letter to the Registrar, and with the Director of Development who agreed that Meredith was planning to file suit. The hard fact to get around is that no person known to be a Negro has ever attended the University. In a similar situation involving the University of Alabama the district court made the finding, which we affirmed, that:

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[13] See footnote 7.

> "There is no written policy or rule excluding prospective students from admission to the University on account of race or color. However, there is a tacit policy to that effect." *Lucy v. Adams*, N.D. Ala., 1955, 134 F. Supp. 235, 239; *aff'd* 228 F. 2d 619; *cert. den'd.*, 351 U. S. 931.

The policy admittedly existed when, even under the *Plessy v. Ferguson* doctrine, Negroes were being admitted to other state universities because the facilities ("programs" here) of the Negro colleges were not equal to the facilities of white colleges. *Sweatt v. Painter*, 1950, 330 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114; McLaurin v. State Regents, 1950, 339 U. S. 637, 70 S. Ct. 851, 94 L. Ed. 1149. By an ironic twist, the defendants, *after Plessy v. Ferguson* has been overruled, seize upon the inferiority of the facilities-programs of Negro colleges as a reason for excluding Negroes at Mississippi's white colleges and universities.

Reading the 1350 pages in the record as a whole, we find that James Meredith's application for transfer to the University of Mississippi was turned down solely because he was a Negro. We see no valid, non-discriminatory reason for the University's not accepting Meredith. Instead, we see a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders.

The judgment of the district court is REVERSED and the case REMANDED with directions that an injunction issue as prayed for in the complaint, the district court to retain jurisdiction.

District Judge DeVANE dissents and his views will be published at a later date.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself and others similarly situated .... Appellant

versus

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, Et Al. .... Appellees

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Appeal from the United States District Court for the Southern District of Mississippi.

(July 10, 1962)

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

DeVANE, District Judge, Dissenting: Considered as a brief in support of appellant's case, the decision of Judge Wisdom is a masterpiece. I agree with almost everything he has to say in the opinion about the defenses advanced by appellees and I further agree that appellees scraped the "bottom of the barrel" in their efforts to keep Meredith out of the University of Mississippi. In so doing appellees weakened their case very much before this Court for on every ground save one the defenses advanced are not deserving of serious consideration by this Court.

The one defense that leads me to dissent is the fear expressed by the appellees that Meredith would be a trouble-maker if permitted to enter the University of Mississippi. Judge Wisdom sets out the evidence forthrightly in his opinion dealing with this issue and reaches the conclusion that it too is not a valid defense to the efforts of appellees to keep appellant out of the University. Considering the facts as he outlines them in his opinion, I disagree with the Court's conclusion on this issue.

Judge Mize heard the case, observed the appellant throughout the trial and reached the definite conclusion from appellant's testimony, his conduct and other testimony that was offered that Meredith would be a trouble-maker if permitted to enter the University. Under such circumstances, the opinion of Judge Mize is entitled to more weight than any conclusion that could be reached by Court of Appeals Judges where their opinion is based upon a cold, printed record of the facts at issue. This conclusion is supported by the last sentence in Judge Wisdom's opinion on this point, when he states:

> "Another short answer (to the defendants' contention) is that Meredith's record shows just about the type of Negro who might be expected to try to crack the racial barrier at the University of Mississippi: a man with a mission and with a nervous stomach."

In considering this matter, I recognize that the appellees never have, and probably never will, approve the decision of the Supreme Court of the United States in *Brown, et al. v. Board of Education of Topeka, et al.*, 347 U. S. 483. Nevertheless, my approach to this issue, and I am sure it was the approach of Judge Mize, is the same as my approach to many laws District Judges are called upon to enforce where the District Judge would prefer that the law was otherwise. This has never deterred me in following the mandates of Congress and the Supreme Court insofar as the laws of the United States are concerned, and I am sure that it would not deter Judge Mize in ordering the appellees to admit Meredith to the University of Mississippi, if he felt that the proof on this issue was not sufficient to support his decision to deny appellant's application for entry.

In passing upon this case, I do not consider that we have a right to ignore what the effect of this decision could be upon the citizens of Mississippi and I feel that it is the duty of our Courts to avoid where we can incidents such as the Little Rock case and I fear that the result of this decision may lead to another comparable situation, particularly for "a man with a mission and with a nervous stomach." Integration is not a question that can ever be settled by Federal Judges. It is an economic, social and religious question and in the end will be amicably settled on this basis.

In my opinion Judge Mize was correct in finding and holding that appellant bore all the characteristics of becoming a troublemaker if permitted to enter the University of Mississippi and his entry therein may be nothing short of a catastrophe.

I, therefore, dissent for the reasons stated above.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1961

No. 19475

D. C. Docket No. 3130 Civil (Jackson Division)

JAMES H. MEREDITH, on behalf of himself and others similarly situated .... Appellant

versus

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, Et al. .... Appellees

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Appeal from the United States District Court for the Southern District of Mississippi.

Southern District of Mississippi
FILED
JULY 18, 1962
Loryce E. Wharton, Clerk
By .... Deputy

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions that an injunction issue as prayed for in the complaint, the district court to retain jurisdiction;

It is further ordered and adjudged that the appellees, Charles Dickson Fair, President of the Board of Trustees of the State Institutions of Higher Learning, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"DeVane, District Judge, Dissents."

June 25, 1962
A True Copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES, Deputy
New Orleans, Louisiana July 17, 1962

Issued: July 17, 1962
Recoverable Costs:
Docketing cause, etc.........$25.00

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk
July 17, 1962

Southern District of Mississippi
FILED
July 18, 1962
Loryce E. Wharton, Clerk
By .... Deputy

Clerk
United States District Court
Jackson, Mississippi

Re: No. 19475—James H. Meredith, etc. vs. Charles Dickson Fair, etc., Et Al. (Your No. 3130 Civil-Jackson Div.)

Dear Sir:

Enclosed is a certified copy of the judgment of this Court in the above case, issued as and for the mandate, together with a copy of its opinion.

Incorporated on the judgment is a detailed statement of the costs in this Court, as follows:

Docketing cause, etc.	$25.00

recoverable by appellant from appellees upon a final settlement of all costs in your court.

Please acknowledge receipt.

Very truly yours,

EDWARD W. WADSWORTH, CLERK
By: CLARA R. JAMES
Chief Deputy Clerk

encs.
cc: (Letter only)
Mrs. C. B. Motley
Mr. R. Jess Brown
Mr. Chas. Clark
Hon. Joe T. Patterson
Mr. Dugas Shands

P. S.—Under separate cover, I am returning to you all the original exhibits forwarded to this Court in connection with the case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

Filed July 18, 1962
at 9:30 A.M.

Ben F. Cameron,
Circuit Judge.

JAMES HOWARD MEREDITH, on behalf of himself and others similarly situated .... Appellant

versus

CHARLES DICKSON FAIR, president of the Board of Trustees of State Institutions of Higher Learning, et al. .... Appellee

---

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the execution and enforcement of the mandate of this court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the execution and enforcement of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that this stay shall be vacated upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT Meridian, Miss. this 18th day of July, 1962.

BEN F. CAMERON
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself and others similarly situated .... Appellant

versus

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, Et Al. .... Appellees

---

Order Vacating Stay, Recalling Mandate, and Issuing New Mandate Forthwith.

(July 27, 1962)

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

WISDOM, Circuit Judge: In this case time is now of the quintessence. Time has been of the essence since January 1961 when James Meredith, in the middle of his junior year at Jackson State College (for Negroes), applied for admission to the University of Mississippi.

This Court heard three appeals of the case. In our opinion on the last appeal we concluded:

> ". . . [F]rom the moment the defendants discovered Meredith was a Negro they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to dis-

> courage and to defeat by evasive tactics which would have been a credit to Quintus Fabius Maximus. . . . We see no valid, non-discriminatory reason for the University's not accepting Meredith. Instead, we see a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders."

Chronology highlights this case. June 25, 1962, this Court reversed the district court and remanded the case with instructions that the district court grant the injunction prayed for in the complaint. Rule 32 of the Rules of the Fifth Circuit, in part, reads:

> "Mandate shall issue at any time after twenty-one days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the mandate will be stayed for a further period of ten days. *No further stay will be granted unless applied for within the delay given above.* A mandate once issued will not be recalled except by the court and to prevent injustice."

During the twenty-one day period the defendants did not apply to this Court for a rehearing or for a stay of mandate. July 17 the mandate went down. Bright and early July 18, the attorney for the defendant presented to the Clerk for filing an order staying "the execution and enforcement of the mandate." The order, dated July 18 at Meridian, Mississippi, was signed by the Honorable Ben F. Cameron, United States Circuit Judge. Judge Cameron was not a member of the Court which heard any of Meredith's appeals. The Court which determined the cause was composed of Circuit Judges Brown and Wis-

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dom and District Judge DeVane, sitting by designation. July 20 the Clerk, acting under instructions from this Court, telegraphed the parties through their counsel, requesting that they exchange and file, within five days, "statements of their positions with memorandum briefs for or against the granting of any stays, including the vacating of the stay entered by Judge Cameron, the issuance by this Court of injunctions pending further appeal, or other appropriate action." The Court has now received and considered the statements and their supporting briefs.

It is unnecessary to decide whether a judge who is not a member of the Court determining the cause is or is not "a judge of the Court rendering the judgment or decree" within the meaning of 28 U.S.C.A. § 2101 (f). Cf. Application of Chessman, 1954, 75 Cal. S. Ct. 85, 274 P. 2d 645.

The Court is bigger than a single judge. Assuming, but without deciding, that Judge Cameron is indeed a judge of "the court rendering the judgment," we hold that the court determining the cause has inherent power to review the action of the single judge, whether or not the single judge is a member of the panel. *Rosenberg v. United States*, 1953, 346 U. S. 273, 73 S. Ct. 1152, 97 L. Ed. 1607, reconsideration denied, 346 U. S. 324, 73 S. Ct. 1171, 97 L. Ed. 1634, reconsideration denied, 346 U. S. 324, 73 S. Ct. 1178, 97 L. Ed. 1634. A contrary position would allow a judge in the minority, were he a member of the panel deciding the case, to frustrate the mandate of the majority. *And it is unthinkable that a judge who was not a member of the panel should be allowed to frustrate the mandate of the Court.*

All of the members of this Court agree that when a mandate has been issued, it is logically and legally too late to stay it. Unless the Court should recall the mandate, the Court's control over the judgment below comes to an end after the mandate has been issued. That is the plain meaning of Rule 32. The authorities fully support the rule. *Omaha Electric Light & Power Co. v. City of Omaha*, 216 Fed. 848, setting aside on rehearing decree in 179 Fed. 455, which aff'd 172 Fed. 494, appeal dismissed 230 U. S. 123, 57 L. Ed. 1419, 33 S. Ct. 974; in re Nevada-Utah Mines & Smelters Corp., 204 Fed. 982, denying rehearing 202 Fed. 126. For this reason the purported stay is vacated and set aside.

Judge Brown and Judge Wisdom are also of the opinion that even if the law should give residual control to an appellate court over an issued mandate broad enough to support a stay in exceptional cases, here the stay order should be vacated and set aside on the ground that it was improvidently granted.

Judge Cameron did not sit on this case. He did not have the opportunity of a sitting judge to study the record, to hear the argument, to discuss the facts and the law in the judges' conference on the case.

This is not a Chessman case. It is not a Rosenberg case. It is not a matter of life or death to the University of Mississippi. Texas University, the University of Georgia, Louisiana State University, the University of Virginia, other Southern universities are not shriveling up because of the admission of Negroes. There was no emergency requiring prompt action by a single judge. Apparently, however, there was a studied decision by the applicants' attorney not to ask the Court for a rehearing or for a stay.

In the matter of stays, this Court is not at all in the position of the Supreme Court. The Supreme Court, as the final arbiter of the ultimate answer to any question sought to be preserved by a stay, has greater latitude than the inferior appellate courts. Courts of Appeal have disciplined themselves to take a restricted view of the propriety of issuing stays. When time is of the essence to the successful party in the Court of Appeals, a stay should be predicated upon a doubtful question of law unresolved by earlier court decisions and there should be a reasonable likelihood of the Supreme Court finally deciding in favor of the applicant for a stay. See Rule 32 of the Rules of the Fifth Circuit Court of Appeals. As recently as October 26, 1961, The Fifth Circuit, sitting as a Court, following a meeting of the Judicial Council, with only Judge Hutcheson absent, rendered the following order:

> "Stays of Mandates of the Court after the denial of a motion for rehearing are to be cautiously granted to avoid situations such as where applicant was the losing party in the trial court and there has been no grant of supersedeas.

Chief Justice Taft, in *Magnum Import Co. v. Coty*, 1923, 262 U. S. 159, 164, 43 S. Ct. 531, 67 L. Ed. 922, established guidelines for granting stays which have withstood the years:

> "The petition should, in the first instance, be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. *That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari;*

and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. If it thinks a question involved should be ruled upon by this court, it may certify it. If it does not certify, it may still consider that the case is one in which a certiorari may properly issue, and may, in its discretion, facilitate the application by withholding the mandate or suspending its decree. This is a matter, however, wholly within its discretion. If it refuses, this court requires an extraordinary showing before it will grant a stay of the decree below pending the application for a certiorari, and even after it has granted a certiorari, it requires a clear case and a decided balance of convenience before it will grant such stay."

In *United States v. Louisiana,* 1960, 364 U. S. 500, 81 S. Ct. 260, 5 L. Ed. 2d 245 the Supreme Court was requested to grant a stay of a three judge court decision which nullified a series of Louisiana laws aimed at maintaining a statewide policy of school segregation. In denying the request for a stay, pending appeal, the Supreme Court ruled, "The scope of these enactments and the basis on which they were found in conflict with the Constitution of the United States are not matters of doubt." Similarly, in *Evans v. Ennis,* 1960, 364 U. S. 802, 81 S. Ct. 27, 5 L. Ed. 2d 36, the Supreme Court denied a stay of a decision by the Court of Appeals for the Third Circuit holding a grade a year plan of desegregation invalid in the State of Deleware. *Evans v. Ennis,* 1960, 3 Cir., 281 F. 2d 385. On the same day, the Supreme Court denied a stay in a school segregation case from Houston, Texas, *Houston Independent School District v. Ross,* 1960, 364 U. S. 803, 81 S. Ct. 27, 5 L. Ed. 2d, 36, where, a district court rejected the school board plan and entered an order embodying its own grade a year plan. *Houston Independent School District v. Ross,* 1960, 5 Cir., 282 F. 2d 95. See also *Orleans Parish School Board v. Bush and Davis v. Williams,* 1960, 364 U. S. 803, 81 S. Ct. 27, 5 L. Ed. 2d 36. In *Lucy v. Adams,* 1955, 350 U. S. 1, 76 S. Ct. 33, 100 L. Ed. 3, the Supreme Court vacated a stay granted by a District Court of its order directing the admission of the first two Negroes to the University of Alabama pending appeal to the Fifth Circuit. The court there held that where the rights are personal and present and where the stay issue is coextensive with that on the merits, the stay should be denied. See also, *Cooper v. Aaron,* 1958, 358 U. S. at 27, 78 S. Ct. 1397, 3 L. Ed. 2d 1. The Supreme Court also refused to reverse the action of Chief Judge Tuttle of the Fifth Circuit when he vacated a stay granted by the District Court, pending appeal, in the University of Georgia case. *Danner v. Holmes,* 1961, 364 U. S. 939, 81 S. Ct. 376, 5 L. Ed. 2d 371. In this case Judge Tuttle's order stressed the fact that it was unlikely that this Court would reverse the District Court's decision in a case in which there had been a trial on a motion for preliminary injunction and a final hearing on the merits where all the facts were aired in a lengthy trial and the judge made lengthy and careful findings of fact. See also, *Hawkins v. Board of Control,* 1958, 5 Cir., 253 F. 2d 752, where this Court issued its mandate forthwith when the District Court delayed further adjudication of Hawkins' right to enter the University of Florida after nine years of litigation through the state court. In *Tureaud v. Board of Supervisors of Louisiana State University*, 1953, 346 U. S. 881, the Supreme Court stayed this Court's reversal of the District Court's injunction order ordering the admission of a Negro student to L.S.U. As a result of the Supreme Court's stay pending certiorari, the injunction order of the District Court was reinstated and the applicant was able to enter the University.

The defendants have an absolute right to apply for a writ of certiorari—regardless of whether the mandate is stayed or issued. Denial of a stay is a minor inconvenience to the defendants. But to allow a stay would subject the successful litigant, Meredith, to the injustice of additional delays. Partly to avoid such a possibility, and to bring the case to a prompt ending after a full trial on the merits, this Court denied a preliminary injunction. Unfortunately, the wording of the mandate, "*that an injunction issue as prayed for in the complaint*" was so loose as to defeat the intentions of Court. Accordingly, the mandate must be clarified by being recalled and amended.

There is no doubt as to the power of the court to recall its mandate. Thus, in *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, 5 Cir., 1938, 97 F. 2d 249, the Fifth Circuit held: "[The Court has the] power to recall the mandate and rehear the case, though too late under our rules regularly to do so." The opinion was written by Judges Sibley, Holmes, and Mize. In that case the term at which judgment was rendered had not closed. It had not in this case. "[T]he power exists to recall the mandate and set aside the judgment even after the expiration of the term during which the judgment became final, but a court of appeals in the exercise of that power usually is guided by its own applicable rules, such as a requirement that good cause must be shown in order for a mandate to be recalled." 14 Cyclopedia of Federal Procedure, § 69.14. See *Hines v. Royal Indemnity Co.*, 6 Cir., 253 F. 2d 111. See also Judge Holmes's opinion for this Court in *Sun Oil Co. v. Burford*, 5 Cir., 1942, 130 F. 2d 10.

It is now ordered forthwith that the mandate and judgment of this Court be recalled and amended by making explicit the meaning that was implicit in this Court's conclusions as expressed throughout its opinion in this cause, dated June 25, 1962. To this end, the order will now read as follows:

> The case is reversed and remanded with directions to the District Court forthwith to grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi. Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual

> admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi, this Court herewith issues its own preliminary injunction enjoining and compelling each and all of said parties to admit plaintiff-appellant to, and allow his continual attendance at the University of Mississippi, further prohibiting and preventing said parties or any of them from excluding said plaintiff-appellant from attendance to and continued attendance thereafter on the same basis as other students at the University of Mississippi.

Judge Cameron's stay order dated July 18 is forthwith vacated and set aside. The mandate in this cause is forthwith recalled and amended as set forth herein. This Court's preliminary injunction against the defendants-appellees is forthwith issued.

JUDGE DEVANE concurs in the result.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

October Term, 1961.

D. C. Docket No. 3130 Civil (Jackson Division)

JAMES H. MEREDITH, on behalf of himself
and others similarly situated .... Appellant
versus
CHARLES DICKSON FAIR, President of the
Board of Trustees of the State Institutions
of Higher Learning, Et Al. .... Appellees

Appeal from the United States District Court for the Southern District of Mississippi.

Southern District of Mississippi
FILED
July 30, 1962
Loryce E. Wharton, Clerk
By .... Deputy

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and after due consideration of the statements of position and memorandum briefs requested by the Court for or against the granting of any stays, including the vacating of the stay entered by Judge Cameron on July 18, 1962, the issuance by this Court of injunctions pending further appeal, or other appropriate action, It is now forthwith ordered that the judgment of this Court, issued as and for the mandate on July 17, 1962, be recalled and amended by making explicit the meaning that was implicit in this Court's conclusions as expressed throughout its opinion in this cause, dated June 25, 1962. To this end, the order will now read as follows:

> The case is reversed and remanded with directions to the District Court forthwith to grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellee, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi.

"DeVane, District Judge, concurs in the result."

July 27, 1962.
A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By: CLARA B. JAMES, Deputy
New Orleans, Louisiana July 27, 1962

Issued: July 27, 1962
Recoverable Costs:
Docketing cause, etc. $25.00

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk
July 28, 1962

Clerk
United States District Court
Jackson, Mississippi

Re: No. 19475—James H. Meredith, etc. vs. Charles Dickson Fair, etc., Et Al. (Your No. 3130 Civil-Jackson Div.)

Dear Sir:

Enclosed is a certified copy of the judgment of this Court in the above case, issued as and for the mandate, together with a copy of its opinion. Please substitute this judgment for the one forwarded on July 27, returning the first judgment issued.

Incorporated on the judgment is a detailed statement of the costs in this Court, as follows:

Docketing cause, etc.	$25.00

recoverable by appellant from appellees upon a final settlement of all costs in your court.

Please acknowledge receipt.

Very truly yours,
EDWARD W. WADSWORTH, CLERK
By: CLARA R. JAMES
Chief Deputy Clark

encs.
cc: (Letter only)
Mrs. C. B. Motley
Mr. R. Jess Brown
Mr. Charles Clark
Hon. Joe T. Patterson
Mr. Dugas Shands

Filed July 28, 1962
a true copy

Ben F. Cameron
Circuit Judge

BEFORE HONORABLE BEN F. CAMERON, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE: CAUSE NO. 19475 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES HOWARD MEREDITH, on behalf of Himself and Others similarly situated — Appellant

versus

CHARLES DICKSON FAIR, President of the Board of Trustees of State Institutions of Higher Learning, et al. — Appellees

A judgment was entered herein by the United States Court of Appeals for the Fifth Circuit on July 17, 1962, which judgment was and is subject to review by the Supreme Court on writ of certiorari and a certified copy of said judgment was, in conformity with the order of this Court dated February 15, 1958 (Page 44 of the Rules of this Court), transmitted as the mandate of this Court *to the United States District Court for the Southern* District of Mississippi, Jackson Division, and was received by said District Court on July 18, 1962. Before said mandate had been executed or enforced, the execution and enforcement thereof was, on July 18, 1962, stayed by the undersigned Judge of said Court of Appeals acting under authority vested in him by the Constitution and laws of the United States (cf. 28 U.S.C.A. Sec. 2101 and

Rules 38 and 36 of the Supreme Court [Revised Rules of 1954—Rules 18 and 27]) and said stay was and is valid and in full force and effect.

It now appearing that a panel of said Court of Appeals has by its order and judgment of July 27, 1962 essayed to set aside said stay of mandate and to conduct further proceedings in this cause in violation and contravention thereof and has entered a judgment and order which have been issued as further mandates in this cause and have been transmitted as such to said District Court; and that such proceedings were and are void and beyond the jurisdiction of said panel and in violation of said stay of July 18, 1962, and it appearing that the judgment and order of said Court dated July 27, 1962 are subject to review by the Supreme Court on writ of certiorari:

IT IS ORDERED that the execution and enforcement of the "Judgment" dated July 27, 1962, issued as and for the mandate of said Court on the same date and the "Order Vacating Stay, Recalling Mandate and Issuing New Mandate Forthwith" dated the same date be and the same are hereby stayed for a period of thirty days from the date of this Order; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this Order there shall be filed with the Clerk of this Court the Certificate of the Clerk of the Supreme Court that Certiorari Petition and record have been filed. It is further ordered that this stay shall be vacated upon the filing of a copy of an Order of the Supreme Court denying the Writ, or upon the expiration of thirty days from the date of this Order, unless the above mentioned Certificate shall be filed with the Clerk of this Court within that time.

IT IS FURTHER ORDERED that the stay granted by the undersigned on the 18th day of July, 1962, be and the same is hereby extended until the expiration of thirty days from and after the date of this Order to enable Appellees to file with the Clerk of the Fifth Circuit Court of Appeals, the Certificate of the Clerk of the Supreme Court of the United States that the Certiorari Petition and certified record required under the rules of said Supreme Court have been filed therein. Said stay, under the terms of the Order granted by the undersigned on the 18th day of July, 1962, is to continue in force until the final disposition of the case by the said Supreme Court if said Petition and record are filed within said thirty day period.

DONE AT MERIDIAN, MISSISSIPPI this 28th day of July, 1962.

/s/ BEN F. CAMERON
United States Circuit Judge

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself
and others similarly situated Appellant
versus
CHARLES DICKSON FAIR, President of the
Board of Trustees of the State Institutions
of Higher Learning, et al. Appellees

This Court on July 26, 1962 entered its opinion and judgment forthwith (1) vacating a stay issued herein by Judge Ben F. Cameron, July 18, 1962, (2) recalling its mandate issued herein July 17, 1962, (3) amending and reissuing its mandate, for the purpose of preventing an injustice, by ordering the District Court to issue forthwith an injunction against the defendants-appellees ordering the immediate admission of the plaintiff-appellant, James H. Meredith, to the University of Mississippi, (4) which opinion and judgment includes an order of injunction by this Court against the defendants-appellees herein.

Now therefore, the following injunctive order is issued:

ORDER

Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:

(1) Ordered to admit the plaintiff, James H. Meredith, to the University of Mississippi, on the same basis as other students at the University, under his applications heretofore filed, which are declared to be continuing applications, such admission to be immediate or, because of the second summer session having started, such admission to be in September, at Meredith's option, and without further registration,

(2) Prohibited from any act of discrimination relating to Meredith's admission and continued attendance, and is

(3) Ordered promptly to evaluate and approve Meredith's credits without discrimination and on a reasonable basis in keeping with the standards applicable to transfers to the University of Mississippi.

In aid of this Court's jurisdiction and in order to preserve the effectiveness of its judgment, this Court entered a preliminary injunction on June 12, 1962. The injunction was against Paul G. Alexander, Attorney for Hinds County, Mississippi, his agent, employees, successors, and all persons in active concert and participation with him and all persons who received notice of the issuance of the order, restraining and enjoining each and all of them from proceeding with the criminal action instituted against James H. Meredith in the Justice of the Peace Court of Hinds County, Justice District No. 5, or any other court of the State of Mississippi, charging that Meredith knowingly secured his registration as a voter in Hinds County but was a resident of Attala County, Mississippi. In further aid of this Court's jurisdiction and in order to preserve the continued effectiveness of its judgment and orders, the said preliminary injunction is continued against the same parties and all other parties having knowledge of this decree pending the final action of the United States Supreme Court if and when the defendants-appellees should apply for a writ of certiorari or for any other appropriate action in this cause by the United State Supreme Court.

It is further ordered that a copy of this order be served upon the defendants-appellees, through their attorneys, and upon Paul G. Alexander, County Attorney for Hinds County, Mississippi, and Joseph T. Patterson, Attorney General for the State of Mississippi.

Entered at New Orleans, Louisiana this 28th day of July, 1962.

/s/ JOHN R. BROWN
United States Circuit Judge.

/s/ JOHN MINOR WISDOM
United States Circuit Judge.

/s/ DOZIER A. DEVANE
United States District Judge.

(ORIGINAL FILED: JULY 28, 1962)

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By: CLARA R. JAMES
Deputy

New Orleans, Louisiana July 28, 1962

Filed July 31, 1962

/s/ BEN F. CAMERON
Circuit Judge

BEFORE HONORABLE BEN F. CAMERON, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE: CAUSE NO. 19475 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES HOWARD MEREDITH, on behalf
of Himself and Others similarly situated . Appellant
versus
CHARLES DICKSON FAIR, President of the
Board of Trustees of State Institutions of
Higher Learning, et al. Appellees

Charles D. Fair and others have moved the undersigned for the entry of an order amending the stay order issued by the undersigned on the 28th day of July, 1962, pursuant to 28 U. S. Code Section 2101(f), and it appearing from said verified motion that the United States Court of Appeals for the Fifth Circuit acted on the 28th day of July, 1962, to issue an amended or substitute order for and in place of an order stayed by the undersigned on the 28th day of July, 1962, and it further appearing that said motion is well-taken and should be granted;

IT IS THEREFORE ORDERED that the stay executed by me on July 28 be and it is extended to cover said amended or substitute order and that the execution and enforcement of the order dated the 28th day of July, 1962 by a Panel of the United States Court of Appeals for the Fifth Circuit, styled No. 19,475, James H. Meredith, on behalf of himself and others similarly situated, Appellant, vs. Charles Dickson Fair, President of the Board of Trustees of the State Institutions of Higher Learning, et al, Appellees, which was issued for and as the mandate of said Court of Appeals on the same date, should be, and the same is hereby, stayed for a period of thirty (30) days from and after the 28th day of July, 1962; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty (30) days from the 28th day of July, 1962, there shall be filed with the Clerk of the Court of Appeals for the Fifth Circuit the Certificate of the Clerk of the Supreme Court that Certiorari Petition and record have been filed. IT IS FURTHER ORDERED that this stay shall be vacated upon the filing of a copy of the order of the Supreme Court denying the writ, or upon the expiration of thirty (30) days from and after the 28th day of July, 1962, unless the above mentioned Certificate shall be filed with the Clerk of said Court of Appeals within that time.

DONE at Meridian, Mississippi, this 31st day of July, 1962.

/s/ BEN F. CAMERON
United States Circuit Judge

FEDERAL RULES OF CIVIL PROCEDURE ADOPTED BY THE SUPREME COURT PURSUANT TO THE AUTHORITY OF 28 U. S. CODE, SECTION 2072

Rule 52.

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 65.

Injunctions

(a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.

(b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

TITLE 28, U. S. CODE

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

TITLE 42, U. S. CODE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

MISSISSIPPI CONSTITUTION OF 1890

Article 8

§ 213-A. The State institutions of higher learning now existing in Mississippi, to-wit: University of Mississippi, Mississippi State College, Mississippi State College for Women, Mississippi Southern College, Delta State Teachers' College, Alcorn Agricultural and Mechanical College, and Mississippi Negro Training School, and any others of like kind which may be hereafter organized or established by the State of Mississippi, shall be under the management and control of a Board of Trustees to be known as the Board of Trustees of state institutions of higher learning, the members thereof to be appointed by the Governor of the State with the advice and consent of the Senate. The Governor shall appoint only men or women as such members as shall be qualified electors residing in the district from which each is appointed, and at least twenty-five years of age, and of the highest order of intelligence, character, learning, and fitness for the performance of such duties, to the end that such Board shall perform the high and honorable duties thereof to the greatest advantage to the people of the State of such educational institutions, uninfluenced by any political considerations. There shall be appointed one member of such Board from each Congressional District of the State as now existing, and one member from each Supreme Court District, and two members shall be appointed from the State at Large. The term of office of said Trustees herein provided for shall begin May 8, 1944; and it shall be the duty of the Governor to make such appointments during the regular session of the Legislature of Mississippi in 1944; and one-third of the membership of said Board shall be appointed for a period of four years; one-third for a period of eight years; and one-third for a period of twelve years; and thereafter their successors shall hold office for a period of twelve years. The members of the Board of Trustees as constituted at the time this amendment shall be inserted in the Constitution as a part thereof shall continue to hold office until their respective terms expire under existing law, after which time the membership of the Board shall consist of the number hereinabove provided for. In case of a vacancy on said Board by death or resignation of a member, or from any other cause than the expiration of such member's term of office, the Board shall elect his successor, who shall hold office until the end of the next session of the Legislature. During such term of the session of the Legislature the Governor shall appoint the successor member of the Board from the district from which his predecessor was appointed, to hold office until the end of the period for which such original Trustee was appointed, to the end that one-third of such Trustee's terms will expire each four years.

One trustee in addition to the above shall be appointed by the Governor for the University of Mississippi, who shall have a vote only in matters pertaining to the University, and which Trustee shall be a resident citizen of DeSoto County, to be known as the Trustee for the La Bauve Fund, and serve for a term of four years to commence from the date of appointment.

Such Board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four years; but said Board shall have the power and authority to terminate any such contract at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.

Nothing herein contained shall in any way limit or take away the power of the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate or abolish any of the above named institutions.

MINUTES OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

September 16, 1954

ORDER WITH REFERENCE TO REQUIREMENTS FOR ADMISSION TO THE STATE SUPPORTED INSTITUTIONS OF HIGHER LEARNING OF THE STATE OF MISSISSIPPI.

It being brought to the attention of the Board that no generally established or applied rule with reference to moral qualifications of all persons applying for admission to any of the State Supported Institutions of Higher Learning is now in existance, and the Board being of the opinion that the welfare of all such Institutions would be better served by establishing a policy in that regard and promulgating rules to implement the same, it was on motion duly made and seconded and by unanimous vote of the Board, ordered that all future applications by residents of this state for admission to any of the state supported Institutions of Higher Learning shall be supported by at least five (5) letters of recommendation as to good moral character from alumni of the institutions to which application is made. Such letters shall certify to the good moral character of the applicant, shall recommend his admission to the instifution, and shall be based on not less than two years personal acquaintance with the applicant. Recommendations from alumni residing in counties other than that of the applicant shall not be considered unless the applicant himself has resided in the county from which he applies for less than two years, in which latter event letters from the county of previous residence may be considered. This order does not apply to applications for admission at the September, 1954, term of such institutions. Five letters of recommendation from reputable sources in communities in which they reside shall likewise be required of nonresident applicants. As to institutions which have not been in operation for ten years, five letters from reputable sources shall be required.

No application shall be considered by the institution until and unless such letters of recommendation as herein required shall have been filed with the admitting authorities.

MINUTES OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

February 7, 1961

Transfer Students: Upon proper motion presented by Mr. E. Ray Izard, seconded by Mr. S. R. Evans, the Board of Trustees unanimously voted to and do adopt the policy that all state supported Institutions of Higher Learning may accept transfer students from other state supported Institutions of Higher Learning, private colleges, or denominational colleges, only when the previous program of the transferring college is acceptable to the receiving institution, and the program of studies completed by the student, and the quality of the student's work in said transferring college is acceptable to the receiving institution and to the Board of Trustees.

Mid-Term Transfers: Upon proper motion presented by Mr. E. Ray Izard and seconded by Mr. S. R. Evans, the Board of Trustees unanimously voted to and do adopt the policy that no student will be allowed to transfer during the midst of a quarter, semester, or trimester except that the student be an exceptional student and when and where the best interest of the student can be shown and the receiving institution and the Board of Trustees consents to the acceptance.

EXCERPTS FROM "BULLETIN OF THE UNIVERSITY OF MISSISSIPPI"

General Catalogue Issue 1960

Page 64:

The University is a community of teachers and students bound together by a common love for learning and by their co-operative efforts to preserve and increase our intellectual heritage.

Page 82:

Admission Requirements

Recommendations. The applicant must file with the Registrar five letters from responsible citizens who have known him for at least two years, certifying to the applicant's good moral character and recommending his admission to the University. An applicant who resides in Mississippi must be recommended by citizens of his county who are University alumni. An applicant who resides in another state may secure the necessary recommendations from any five responsible citizens of his community.

Page 83:

Admission of Transfer Students: Advanced Standing. Students may be admitted from other approved institutions of higher learning upon the presentation of official transcripts of credits which certify honorable dismissal and eligibility for immediate readmission. Transcripts must provide a detailed statement of preparatory units (which must satisfy requirements for admission to the freshman class), and a record listing all college credits and grades.

The Registrar, under the direction of the Committee on Admissions, will provide each transfer student with an evaluation of the credits acceptable to the University. The dean of the college or the school to which the student is admitted will inform the student the extent to which his credits will apply toward the degree sought.

Transferred credits will be accepted at their original grades. In meeting the grade-point requirements for graduation, the student must raise a low average on the transferred record with higher grades at the University. Transferred credits will also be counted for academic honors and for graduation with distinction if at least sixty-four semester hours of credit toward the bachelor's degree are completed in this institution. In all cases the student is required to qualify for graduation on the basis of his record in the University as well as on his entire record.

Page 116:

5. Residence Requirements

a. Minimum Residence Requirement. No application for a degree in any undergraduate school or college of the University will be considered for approval unless the student has spent the equivalent of at least one full-time academic year in residence on this campus and has earned at least thirty semester hours of such residence credit in the school or college recommending the degree. Students who have been in residence for more than a year must acquire the last fifteen hours of credit in residence.

b. Transfer Students. A transfer student who spends only a year in residence must attend that year in which he completes the degree requirements.

Page 121:

Nonresident Students

A nonresident student is one who may be classified as follows:

2. If he is twenty-one years of age or more and has not resided in Mississippi for twelve months after he reached the age of twenty-one or for twelve months immediately prior to his registration in the University, he is a nonresident.

3. Ownership of property in Mississippi does not affect the above classifications.

Page 122:

Legal Residence of an Adult. The legal residence of an adult is the place where he is domiciled; that is, the place where he is generally understood to reside with the intention of remaining there indefinitely or of returning there when absent.

Residence in an Educational Institution Not Counted. A person who has entered the State of Mississippi from another state in order to enter an educational institution is considered a nonresident. For this reason, any period of time when such a person is enrolled in an educational institution anywhere in Mississippi may not be counted as any part of the twelve months prerequisite to his admission to the University as a resident student. Even though he may have been legally adopted by a resident of Mississippi, may have become a qualified voter, or may otherwise have sought to establish legal residence, such a person will still be considered as being in Mississippi primarily for the purpose of enrolling in an educational institution and will, therefore, be classified as a nonresident.

EXCERPTS FROM "MINUTES OF THE MEETING OF THE COMMITTEE ON ADMISSIONS"

Monday, May 15, 1961

3. *Acceptance of credits from institutions which are not regionally accredited.*

Mr. Ellis reported that there were nine applicants for both the summer session and the first semester who submitted credits from institutions that are not accredited by one of the regional accrediting associations. Most of the applications of this kind, he indicated, are submitted by students who live outside the State of Mississippi.

The University's present policies were briefly reviewed by the Chairman. A motion was then approved to accept credits only from institutions which are members of a regional accrediting association or a recognized professional accrediting association.

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk

July 25, 1962

Hon. Joe T. Patterson
Attorney General of the
State of Mississippi
Jackson 5, Mississippi

Attn: Mr. Charles Clark
Special Asst. Attorney General

Re: No. 19475—James H. Meredith vs. Charles D. Fair.

Dear Sir:

At the direction of this Court, I write to acknowledge receipt of your letter of July 19th, requesting from this office a certified copy of the transcript of record in the referenced case for your use in connection with a petition for writ of certiorari to be filed in the Supreme Court.

In reply thereto, I am authorized to advise that this matter is considered as still pending in this Court at this time, and when the Court rules upon the motions heretofore filed, and this day presented in accord with its previous directive, I will then be authorized to forward to you promptly a complete transcript of all proceedings had in this Court, including the motion most recently filed and any order which may hereafter be entered. In the meantime, you are advised that I have available only two (2) copies of the mimeographed record, and could therefore furnish you with only one (1) certified and one (1) additional copy of the record as filed in this Court. However, when the Court rules on these pending motions I shall request that the three (3) copies previously forwarded for its use be returned for further relay to your office on petition for writ of certiorari. In short, I expect hereafter to be able to provide one (1) certified record, together with four (4) additional copies. No additional copies could be furnished, in view of the regulations requiring that I retain the remaining copies for my permanent files.

Very truly yours,

/s/ Edward W. Wadsworth
Clerk.

WESTERN UNION TELEGRAM

112 1A Cst Jul 20 62 NSA146
NS MZA029 Long PD MZ New Orleans La 20
1058A Cst

Hon. Joe T Patterson
Attorney General of Mississippi
Jackson Miss.

Re: Meredith vs Fair. I have been directed by the court to send this telegram. The mandate of this court issued on July 17th. On July 18th, Judge Ben F Cameron entered an order 28 U. S. Code 2101(f) staying its execution and enforcement pending action on an application for writ of certiorari to the Supreme Court. The court is of the opinion that for the order to be effective a recall of the mandate is necessary. Recall of a mandate of this court is governed by Rule 32 which provides in pertinent part: "a mandate once issued will not be recalled except by the court and to prevent injustice."

The parties are directed to file and exchange within five (5) days time typewritten statements of their positions with memorandum briefs for or against the granting of any stays, including the vacating of the stay entered by Judge Camerion, the issuance by this court of injunctions pending further appeal, or other appropriate action. The matter will not be heard orally.

Edward W Wadsworth, Clerk U S Court of Appeals,
Fifth Circuit

17 18 28 2101(F) 32 (5).

AFFIDAVIT OF COUNSEL

State of Mississippi
County of Hinds:::::

Personally came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named CHARLES CLARK, who, being by me first duly sworn, states on oath as follows, to-wit:

On the 18th day of July, 1962, Honorable Ben F. Cameron marked a motion for stay of execution and enforcement of mandate and an order on said motion, "Filed", and returned these instruments to affiant with the directions that affiant was to proceed immediately from Meridian, Mississippi, where such actions were taken, to the office of the Clerk of the Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, and to deliver these instruments to said Clerk. Affiant proceeded at once to do so and did, on the afternoon of that date at approximately 1:15 p.m., handed each and both of said instruments to the Chief Deputy Clerk of said Court in New Orleans. At the time of the delivery of said instruments, affiant requested the Clerk to furnish affiant with two certified copies of said order. The Clerk advised counsel that the Court had directed him not to take any action whatsoever with regard to such motion or order and not to furnish a certified copy thereof to counsel or anyone else.

/S/
Charles Clark

SWORN TO AND SUBSCRIBED BEFORE ME, this 15 day of August, 1962.

/S/ Lee Wiman
Notary Public
My Commission Expires: 8/27/63

(Seal)